92-1536

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

CIRCLE NATIVE COMMUNITY

Petitioner,

v.

STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Petition For Writ Of Certiorari To the Supreme Court Of The State of Alaska

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do Alaskan Native Tribal Courts retain concurrent jurisdiction over child custody matters?

LIST OF PARTIES

The parties to these proceedings are:

Petitioner: the Circle Native Community;

Respondent: the State of Alaska, Department of Health and Social Services;

Other parties: J.J., the mother of the minor children, and F.P., W.M. and A.M., the minor children.

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STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

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Petition For Writ Of Certiorari To the Supreme Court Of The State of Alaska

PETITION FOR WRIT OF CERTIORARI

The Circle Native Community respectfully petitions for a Writ of Certiorari to review the decision of the Supreme Court for the State of Alaska in this case.

OPINIONS BELOW

The Alaska Supreme Court opinion is currently pending publication (Appendix A, App. A-1) *In re F.P.*, Ak. Sup. Ct. Op. No. 3906 (Dec. 18, 1992). The June 28, 1991, Order of the Superior Court for the State of Alaska, Fourth Judicial District, is unpublished. (Appendix B, App. B-1). The February 27, 1990 order of the Superior

Court of the State of California for the County of Santa Clara is unpublished. (Appendix D, App. D-1)

JURISDICTION

Jurisdiction of this Court to review the Alaska Supreme Court's decision in this matter is conferred by 28 U.S.C. §1257(3). The opinion of the Alaska Supreme Court was filed on December 18, 1992.

STATUTES TO BE CONSTRUED

The text of the following statutes are set forth in Appendix C:

P.L. 83-280 - 28 U.S.C. §1360

Indian Child Welfare Act – 25 U.S.C. §§1911, 1918

STATEMENT OF THE CASE

This case arises out of a child protection proceeding involving three Alaska Native children who are members of the Circle Native Community,[1] an Indian tribe

[1] When this case was initiated, the name of the tribe was the Native Village of Circle. On October 4, 1991, the village reorganized under the terms of the Indian Reorganization Act and changed its name to the Circle Native Community. While the latter name was used in the State Court proceedings, the proper current name for the tribe is used here.

recognized under the terms of the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 *et seq.*)[2]

This case originally began in the California courts in 1985, where the mother originally resided. In 1985, the mother was arrested in California on charges of misconduct involving a controlled substance, and the oldest child, F.P., who was about six months old, was taken into

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[2] The Circle Native Community is an "Indian tribe" as defined under the Indian Child Welfare Act, 25 U.S.C. 1903(8). Under this section, "Indian tribe" is defined as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43." 43 U.S.C. 1602(c) states that "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615. 43 U.S.C. 1610(b)(1) contains a list of Native villages, one of which is the Native Village of Circle.

In *Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990) *rev. on other grounds, Blatchford v. Native Village of Noatak*, 111 S.Ct. 2578 (1991); the Ninth Circuit found that the Alaska Native Claims Settlement Act (ANSCA) constituted Congressional recognition of Native villages as Indian tribes. In that case, the Ninth Circuit specifically found that the Native Village of Circle was an Indian tribe. This Court did not disturb that part of the Circuit Court's ruling.

The recent United States Department of the Interior's Solicitor's opinion supports the view that the Alaska Native villages listed in ANSCA are presumptively Indian tribes: " . . . we do believe that there is sufficient merit to the first argument for the BIA and other agencies to proceed in the administration of programs on the presumption that Native villages listed on the modified ANSCA list are tribes." *See* Office of the Solicitor Memorandum, *Governmental Jurisdiction of Alaska Native Villages Over Land and Non-members*, page 59, M-36975, January 11, 1993.

protective custody by the Santa Clara County authorities and placed in foster care with her maternal aunt. This initial incident preceded the birth of the two younger children.

In the following five years, the County's protective intervention continued as the family continued in crisis.[3] During this time the two younger children were born and subsequently taken into custody. Santa Clara County notified the tribe as provided by the Indian Child Welfare

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[3] In 1986, after the mother had violated a court order by leaving a residential treatment center to which she had been committed, the County of Santa Clara proceeded with permanency planning. Although an aunt petitioned for guardianship, she herself was arrested on drug charges and the petition was never approved. A subsequent investigation into the history of this family revealed an extensive record of domestic violence and substance abuse by numerous family members.

In June of 1988 the second child, W.M., was born, and was shortly thereafter placed in foster care.

The State of California's child protection case was monitored the entire time through the local and tribal ICWA program in Santa Clara County. When the County began to seek an adoptive placement for the children in 1989, the Native Village of Circle formally intervened in the State Court proceedings.

The third child, A.M., was born in November of 1989, and was then placed in foster care.

Although the mother had been jailed again in October 1989 on burglary charges, a psychological evaluation of the mother indicated that she had "made some tenuous first steps toward emotional recovery from a chronically self-destructive lifestyle, which began early in violence and crime."

Given this psychological evaluation, the County and the Tribe, acting in concert, formulated another case plan aimed at a gradual reunification of the children with the mother. But in February of 1990 the mother was again arrested on drug charges.

Act, and the tribe and county began to work together on the case. Unfortunately, efforts to rehabilitate and reunite the family in California were not successful.

In March 1990 the tribe moved to transfer the matter to tribal Court under 25 U.S.C. §1911(b). The Santa Clara County Court granted the motion and transferred jurisdiction of the case to the Circle Native Community. At the time the mother did not oppose the transfer of jurisdiction.

In the Tribal Court, a new case plan attempted a last effort at reunification. The family was relocated to Alaska, and the children were placed in foster care in Fairbanks. The mother was placed in a residential treatment facility in Fairbanks following her release from prison in California.

The mother successfully completed the residential treatment program in August of 1990 and entered an outpatient treatment program. The Tribe continued to provide extensive services to the family including setting up a financial plan using AFDC and tribal rent assistance; helped the family secure housing; and provided on-site monitoring of the family situation.

In March 1991 the Alaska State Troopers, responding to a call, found the mother of the children unconscious and bleeding from a cut on her foot. Temporary custody of the children was taken immediately by the State Division of Family and Youth Services and the children were placed in foster care.

On March 25, 1991 the Tribe moved to dismiss the State's Court proceedings and resume management of the

case under 25 U.S.C. 1911(a). The Motion to Dismiss was based on the Tribe's prior exclusive jurisdiction over the matter. The State Department of Health and Human Services opposed the village's motion and on June 28, 1991, the Alaska Superior Court denied the Tribe's Motion to Dismiss.

The Tribe appealed the denial of the Motion to Dismiss to the Alaska State Supreme Court in October 1991. On December 18, 1992 the Supreme Court issued an opinion affirming the Superior Court's decision to deny the Tribe's Motion to Dismiss, holding that Alaska Native tribes lacked the jurisdiction to decide child custody matters. This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

A. Summary

The decision of the Alaska Supreme Court is in direct conflict with the opinion of the Ninth Circuit Court of Appeals on a matter of federal Indian law. The Ninth Circuit has held that the Alaskan Tribes have concurrent jurisdiction over child custody proceedings. The Alaska Supreme Court's decision specifically rejects this position by holding that Alaskan Tribal Courts lack any jurisdiction over such matters. Additionally, the case presents a direct conflict between the Courts of California and Alaska in the context of this case, since California has transferred the matter to the tribe's jurisdiction, and Alaska has held that the Tribe lacks jurisdiction to hear the matter.

The conflicting decisions involve an important legal issue which has a significant impact upon many tribes and states. The decision directly affects over 200 Alaskan tribes, many of which are currently exercising tribal court jurisdiction over children's proceedings. Moreover, the decision indirectly affects many other non-Alaskan tribes subject to P.L. 280, which have fully functioning Tribal Courts. Finally, the matter affects almost all other states, since the majority of States seem to agree with the Ninth Circuit respecting the retained judicial power of Alaskan tribes to hear child custody matters. In such circumstances, it is likely that this matter will continue to arise as other states transfer ICWA proceedings to Alaskan tribal courts in accordance with the Ninth Circuit's decision.

Finally, the holding that P.L. 280 and ICWA imply a divestiture of tribal jurisdiction over child custody proceedings is at odds with recognized principles of Indian law articulated by this Court.

B. Reasons

1) Direct Conflicts Between Ninth Circuit and Alaska Supreme Court.

The ruling of the Alaska Supreme Court directly conflicts with the decision of the Ninth Circuit Court of Appeals in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991). In that case, the Ninth Circuit held that Alaskan Native tribes had concurrent jurisdiction in child custody matters. Under this decision, tribes such as Circle have the power to hear and decide custody matters respecting their children. As noted by the Alaska

Supreme Court, the *Venetie* court held that Alaska Native villages could be considered "sovereign", and therefore entitled to "the same rights and responsibilities as sovereign bands of native (sic) Americans in the continental United States". *Id.*, at 559.[4]

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[4] The Alaska Supreme Court correctly noted that in the *Venetie* case, the Court qualified the opinion based upon the condition that the tribal government must be a modern day successor to the sovereign historical bands of natives (sic)." This language relates to the unique tribal structure of the Venetie IRA, which is the governing body for the villages of Venetie and Arctic Village. In the case of Circle, there is no serious question about the fact that the Circle Native Community is the modern day successor to the sovereign historical bands of Natives of the area. As was noted in the briefing before this Court in *Blatchford v. Native Village of Noatak*, 111 S.Ct. 2578 (1991), the historical status of Circle is demonstrable by readily available anthropological material. Originally, the band was a Tudush Gwitchen Athabascan village with a semi-permanent settlement on the Yukon River approximately 48 miles upriver from current day Circle prior to 1883. *Compilations of Narrative of Explorations in Alaska*, US Govt. Printing Office, Washington, DC, 1900, Report of Lt. Schwatka, p. 315-316. *See also* Federal Field Committee for Development and Planning in Alaska, *Alaska Natives and the Land*, US Govt. Printing Office, Washington, DC, 1968. At this time, the village was governed by Chief Charlie, and was known as Charlie's Village. *Compilations id.*, at 343. In 1887, a trading post was established at the present location of Circle, which became a boom town during the gold strike on Birch Creek in 1893. Orth, *Dictionary of Alaska Place Names*, Geological Survey Professional Paper 567, US Govt. Printing Office, Washington, DC, 1967, p. 219. During this time, some of the members of Charlies Village moved to Circle. In 1914, as the gold boom ended, the old village was destroyed by the ice breakup of that year and the remaining members of the village moved to the present site of Circle. *Alaska Natives and the Land*, id., at 206. Until recently, the village was governed by various forms of

On the other hand, the Alaska Supreme Court has taken an opposite view. As noted in its opinion in this case, the Alaska Court has held that Congress has indicated that Alaskan Native groups should not be treated as sovereigns. *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 34 (Alaska 1988). As a consequence of this fundamental view, the Alaska Supreme Court has consistently held that P.L. 280 invested the State courts with exclusive jurisdiction over matters involving the custody of Indian children. *Native Village of Nenana v. Dept. of Health and Social Services*, 722 P. 2d 219 (Alaska 1986), *cert. denied*, 479 U.S. 1008 (1986); *In Re K.E.*, 744 P.2d 1173 (Alaska 1987).[5] The Alaska Supreme Court's opinion specifically notes that its holding is contrary to the holdings of the Ninth Circuit and that the Alaska Supreme Court is not bound by the decisions of the federal courts other than the United States Supreme Court. *In Re F.P., supra* at p. 2 n. 1 *citing Harrison v. State*, 791 P.2d 395, 363 n.7 (Alaska App. 1990). The

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traditional tribal governments. In 1991, the village reorganized its tribal government in a federal election conducted by the Secretary of the Interior under the terms of the Indian Reorganization Act 25 U.S.C. §476.

[5] The case *In Re J.M.*, 718 P.2d 150 (Alaska, 1986) is an anomalous result. In that case, the Alaska Court held that the Native Village of Kaltag had exclusive jurisdiction under the terms of 25 U.S.C. §1911(a). However, the Court did not address the effect of P.L. 280 or the reassumption terms of ICWA. The vitality of this case is in substantial question in Alaska. Notwithstanding the fact that the case has never been overruled by the Alaska Supreme Court, it is widely argued that the case has been overruled by implication of the subsequent decisions in *Nenana, K.E.*, and the present case.

conflict between the Alaska State Supreme Court and the Ninth Circuit in this matter is direct and unambiguous, and, as noted in the Alaska Court's opinion, is only resolvable by this Court.

2) Direct Conflict Between Alaska and California Courts.

This case uniquely presents a direct conflict between Alaska and California courts within the confines of this specific case. The California Court transferred the matter to the Tribe under 25 U.S.C. 1911(b), which is consistent with the Ninth Circuit's construction of ICWA. Since P.L. 280 does not subject Alaskan tribes to California jurisdiction, the California court would have been required to treat the Alaska tribe as any other tribe.[6]

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[6] This aspect of the case clearly illustrates the logical inconsistency of the Alaska decision. The conclusion that Alaska tribes lack concurrent jurisdiction over children's proceedings rests upon the assumption that P.L. 280 transferred all jurisdiction over civil matters from the federal courts to the Alaska state courts. Conceivably, this would leave no residual jurisdiction to the tribes. However, P.L. 280 only governs the jurisdictional relationship between states and the tribes within these particular states. As noted in *In Re Adoption of Buehl*, 555 P.2d 1334 (Wash. 1976), P.L. 280 did not grant any jurisdiction to a state respecting Indian tribes outside the boundaries of that particular state. Consequently, while P.L. 280 may have granted jurisdiction to Alaska over Indians within the State of Alaska, it is totally silent respecting the jurisdiction of California state courts over Alaska Natives and tribes. Even if P.L. 280 where to be construed as a divestiture of tribal jurisdiction respecting Alaska, it could not be construed to divest Alaskan tribes of any jurisdiction vis-a-vis the California courts.

In a subsequent collateral action respecting the same children, the Alaska courts have applied a conflicting construction of ICWA holding that the Tribe lacks any jurisdiction to determine these matters. This is totally irreconcilable with the California court's judgement. in short, California has decreed that the Tribe has jurisdiction over these children, while Alaska has decreed that the Tribe does not have jurisdiction over these same children. The obvious effect is a total disruption of the Tribal Court's orderly consideration of the affected child's welfare.

3) Impact Upon Alaskan and Other P.L. 280 States and Tribes.

This case involves an important legal issue which has a significant impact upon many tribes and states. The decision directly affects over 200 Alaskan tribes, many of which are currently exercising tribal court jurisdiction over children's proceedings. The Alaska Native Claims Settlement Act (ANSCA) lists over 200 Native villages in Alaska. *See* 43 U.S.C. 1610(b)(1). According to the analysis employed in *Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir.

Of course, the argument suffers from a second logical fallacy: *i.e.*, the assumption that the federal jurisdiction transferred to the State's under P.L. 280 was exclusive jurisdiction. The law, however, is quite clear that the federal courts enjoy concurrent jurisdiction with the tribes. *U.S. v. Wheeler*, 453 U.S. 313 (1978). Consequently, the Alaska courts conclusion that P.L. 280 gave the states exclusive jurisdiction over Indians in the affected states would suggest that P.L. 280 gave the State courts greater jurisdiction over Indian affairs than enjoyed by the federal courts.

1990) (*rev. on other grounds* in *Blatchford v. Native Village of Nostak*, 111 S.Ct. 2578 (1991)), these Native villages are "Indian tribes" recognized as such by the Secretary of the Interior. Therefore, all of these tribes are affected by the conflict between State and Tribal Court jurisdiction.

Many of these Alaska Native villages are currently exercising tribal court jurisdiction over children's proceedings, which have given rise to numerous Tribal-State jurisdictional conflicts. For example, *Graybeal v. State of Alaska*, 17 Indian Law Reporter 2206 (9th Cir. Aug. 28, 1990) involved an Athabascan Indian child from the Native Village of Northway who was taken into protective custody by the State of Alaska and placed with the child's relatives. The Northway Tribal Court subsequently entered a Tribal Court order of adoption, granting these relatives full parental rights. Ultimately, the Ninth Circuit held that the adoptive parents had legal custody of the child.

In Re J.M., 718 P.2d 150 (Alaska 1986) involved a conflict of jurisdiction between the State of Alaska and a Alaska Native village tribal court. In that case, the Native Village of Kaltag claimed exclusive prior jurisdiction through its tribal court under section 1911(a) of the ICWA. *Id.* at 152. The tribe claimed that it had assumed legal protective custody of the child before the State of Alaska. *Id.* The State of Alaska opposed the tribe's position, but the Alaska State Supreme Court agreed that Kaltag had exclusive jurisdiction. *Id.* at 152, 153. *See also Native Village of Stevens v. Smith*, 770 F.2d 1486 (9th Cir. 1985) (Determination by tribal council that it would be in the best interest of the child to be taken into tribal custody constituted "judicial determination" of necessity for

foster care, for purposes of entitlement to federally assisted foster care payments), *cert. den.*, 106 S.Ct. 1640, 475 U.S. 1121, 90 L.Ed.2d 185; *Native Village of Venetie I.R.A. Council v. State of Alaska*, 918 F.2d 797 (9th Cir. 1990) (Alaskan Native villages were entitled to exercise concurrent jurisdiction with state over child custody determinations, requiring the State of Alaska to give full faith and credit to such determinations under the Indian Child Welfare Act, to the extent the villages were modern-day successors to historical sovereign bands of Native Americans).

In the Tanana Chiefs Conference, Inc., region[7] which includes 43 Native villages in Interior Alaska, there are eight pending child protection tribal court cases. They are: *In the Matter of L.W.*, Anvik Tribal Court No. 92-002, *In the Matter of the T. and E. Children*, Anvik Tribal Court No. 92-001; *In the Matter of the I. Children*, Dot Lake Tribal Court No. 92-0001; *In the Matter of N.J.*, Grayling/Shageluk Joint Tribal Court No. 01-92; *In the Matter of the P. Children*, Koyukuk Tribal Court No. 92-1; *In the Matter of K.D.*, Nenana Tribal Court No. 92-7-1; and *In the Matter of J. B.*, Holy Cross Tribal Court No. 91-1.

The Tribal court case pending in Holy Cross, *In the Matter of J.B.*, has a similar factual situation to the present *F.P.* case. In that case, the State of California transferred jurisdiction of its Indian child protection case to the Native Village of Holy Cross Tribal Court. Later, the State of Alaska took emergency custody of the child while the Tribal Court case was still pending. The Native Village of

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[7] Circle is within the Tanana Chiefs Conference region.

Holy Cross filed a Motion to Dismiss in the State's case (Superior Court Case No. 3AN-92-206/207 CP) because the Tribal Court had prior jurisdiction. The State Superior Court is holding its decision on the Motion to Dismiss in abeyance pending the outcome of the present case.

It is clear that the issue Tribal Court jurisdiction over children's matters will have a significant impact on the tribes in Alaska and the resolution of present and future Tribal Court cases.

The Alaska Supreme Court's decision in the present case could also indirectly affect many other non-Alaskan tribes subject to P.L. 280 (28 U.S.C. Section 1360; 18 U.S.C. 1162). P.L. 280 affects many states and the tribes within those states. Under the original statute, five states (California, Nebraska, Minnesota, Oregon and Wisconsin) were given jurisdiction "mandatorily," i.e., the state had no option whether or not to accept. The Territory of Alaska was added in 1958. (P.L. 85-615:72 Stat. 545 (1958)) Nine other states (Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, and Washington) assumed jurisdiction under the "optional" provisions of the statute. States that assumed jurisdiction through parallel legislation are New York, Kansas, North Dakota, and Iowa. Consequently, 17 states, and the numerous tribes within the states could be affected by the issues presented in this case. See Cohen, *Handbook of Indian Law,* pp. 362-363 n. 125; 372-376 (1982 ed.)

Of these 17 States, Alaska is the only State which has taken the position that Alaska Tribal Courts lack jurisdiction over child protection cases. *See In re Will of Jimeson,* 328 N.Y.S. 2d 466 (1972); *People v. Boots,* 434 N.Y.S.2d 850

(1981); *Val/Del Inc. v. Superior Court,* 145 Ariz. 558, 703 P.2d 502, 509 (Ariz. App. 1985); *Criminal Jurisdiction on the Seminole Reservation in Florida,* 85 I.D. 433 (Op. Sol. N-36907, Nov. 14, 1978); Op. No. 48 Atty. Gen. Neb. (1985); 70 Op. Atty. Gen. Wisc. 237 (1981). This issue effects these and all other States, because the majority of States appear to agree with the Ninth Circuit's position that Alaska Native tribes retain jurisdiction to hear child protection matters. Consequently, it is likely that other states will continue to transfer children's matters to Alaskan tribal courts.

4) The Decision is Wrong on its Merits.

The power of Indian tribes to operate tribal courts and administer justice is well established. *Ex Parte Crow Dog,* 109 U.S. 556 (1883); *U.S. v. Wheeler,* 435 U.S. 313 (1978); *Fisher v. District Court,* 424 U.S. 382 (1976). In the case of Circle, the new tribal constitution approved by the Secretary of the Interior under the Indian Reorganization Act (25 U.S.C. 476) specifically provides that the Tribal Council shall have the power

> To administer justice by serving as or establishing a Village court, and defining its duties and powers consistent with Federal law and Circle Village Judicial Code;

CONST. CIRCLE NATIVE COMMUNITY, ART. VIII, SEC. 1(1) (Appendix E).

As noted above, the issue as to whether tribes subject to P.L. 280 retain concurrent judicial power over their people and lands is an important question affecting tribes

in 19 states. The issue has been the subject of some litigation. This Court has specifically reserved the issue in *Washington v. Confederated Bands and Tribes of the Yakima Nation*, 439 US 463, 488 n. 32; 501 n. 48 (1979).[8]

With regard to children's matters, this Court has long since decided that Tribes retain jurisdiction over tribal children residing or domiciled within Indian country. *Fisher v. District Court*, 424 U.S. 382 (1976).[9] That case held that the Northern Cheyenne Tribal Court had exclusive jurisdiction vis-a-vis the states over a child custody matter involving a child member residing on the tribe's reservation. The *Fisher* decision was a capstone on a line of cases which held that Indian family matters involving child custody and adoption constituted essential tribal interests over which the tribes could exercise jurisdiction and be protected from unwarranted state government intrusions. *Wisconsin Potowatomies v. Houston*, 393 F. Supp. 719 (D. Mich. 1973); *Wakefield v. Little Light*, 276 Md. 333, 347 A. 2d 228 (1975). As with most tribal court matters, tribal court jurisdiction is concurrent with federal court

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[8] On remand before the Ninth Circuit, the Court held that state jurisdiction acquired under P.L. 280 was not exclusive as to the tribe and federal government. *Washington v. Confederated Bands and Tribes of the Yakima Nation*, 608 F.2d 750, 752 (9th Cir. 1979). Similarly, the US District Court has confirmed the concurrent criminal jurisdiction of the Colville Tribal Courts under P.L. 280. *Confederated Tribes of the Colville Indian Reservation v. Beck*, No. C-78-76 [6 ILR F-8] (E.D. Wash., Dec. 21, 1978).

[9] *See also Montana v. United States*, 450 U.S. 544, 564 (1981) (Tribes retain their inherent power to regulate domestic relations among members.)

jurisdiction over Indians. *U.S. v. Wheeler,* 435 U.S. 313 (1978).

In 1978, Congress confirmed the power of tribal courts over this subject area by enacting the Indian Child Welfare Act (ICWA). The Act confirmed tribal court jurisdiction over Indian children residing on Indian reservations, and provided for the transfer to tribal courts of State court proceedings respecting Indian children residing off reservation. 25 U.S.C. 1911. In most cases, tribal jurisdiction was exclusive, "except where such jurisdiction is otherwise vested in the State by existing Federal law". 25 U.S.C. 1911(a). This exception clearly refers to the 17 states which are subject to P.L. 280 or similar federal statutes extending state court jurisdiction over Indians in those states. Alaska is one of the states subject to P.L. 280.

There is little question that historically Alaska Natives developed tribal laws regulating child custody and adoption. See *Calista v. Mann,* 564 P.2d 53 (Alaska 1977)[10] Equally, there is little question that P.L. 280 extends state jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country within the State of

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[10] Equally, there is little question that Alaskan Natives had developed customary laws relating to marriage. *See Validity of Marriage by Custom Among the Native or Indians,* 54 ID 39 (1932). More specifically, the Athabascan people have clearly developed a traditional system of law governing their society. *See* Hippler & Conn, *Traditional Athabascan Law Ways and Their Relationship to Contemporary Problems of "Bush Justice".* (Institute of Social, Economic and Government Research, U. of Alaska, 1972).

Alaska. 28 U.S.C. §1360. The Alaska Supreme Court, however, has consistently held that this statute vests into the State Courts *exclusive* jurisdiction over such matters. In other words, the Alaska Courts have held that P.L. 280, and the ICWA – read together – have abrogated the power of tribal courts to determine matters of Indian child custody. *In Re F.P.*, supra. (1992); *Native Village of Nenana v. Dept. of Health and Social Services*, 722 P.2d 219 (Alaska 1986), *cert. denied*, 479 U.S. 1008 (1986); *In Re K.E.*, 744 P.2d 1173 (Alaska 1987). The Alaska Court's holdings in this line of cases do not rest upon the notion that P.L. 280 or ICWA expressly abrogated tribal powers. Rather, the Court's opinions conclude that such tribal powers were abrogated by implication.

These holdings are contrary to the generally accepted principles of Indian law articulated by this Court. In *Iowa Mutual Insurance Co. v. LaPlante*, 480 US 9, 20 (1987) this Court held

> Civil jurisdiction over such activities [by non-Indians] presumptively lies in the Tribal courts unless affirmatively limited by a specific treaty provision or federal statute. Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, *the proper inference from silence . . . is that the sovereign power remains intact.* (emphasis added)

citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n. 14 (1982) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Unless Congress acts to abrogate a tribal power, the tribes retain their existing sovereign powers. Similarly, this Court has held that repeal by implication of an

established tradition of immunity or self-governance respecting Indians is disfavored. *Rice v. Rehner,* 463 U.S. 713, 720 (1983); *See also Bryan v. Itasca County,* 426 U.S. 373, 392 (1976). Thus, since Alaska Natives have traditionally regulated child custody and domestic relations matters prior to P.L. 280, the tribes would not lose such powers absent the express language in P.L. 280.

P.L. 280 is absolutely silent as to the power of Alaskan tribal courts. On the contrary, the statute plainly contemplates that tribal governmental power would continue, by providing that tribal ordinances and customs would be given full force and effect in civil cause of action. This Court in *Three Affiliated Tribes v. Wold,* 476 U.S. 877 (1986) stated that

> Pub. L. 280 was plainly not meant to effect total assimilation. . . . [N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the states should result in the undermining or destruction of such tribal governments as did exist.

See also Bryan v. Itasca County, 426 U.S. 373, 388 (1976). Consequently, tribes subject to P.L. 280 have been held to retain concurrent criminal jurisdiction over their members. *Walker v. Rushing,* 898 F.2d 672, 675 (8th Cir. 1990). There is nothing contained in the civil portion of P.L. 280 which would suggest a different result respecting the exercise of civil jurisdiction by Indian tribes.

Similarly, it is difficult to find in ICWA specific language which abrogates tribal authority over children's matters. On the contrary, this Court has found in ICWA a significantly different Congressional intent. In *Mississippi*

Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 45 (1989) this Court noted that

> (ICWA's) purpose was in part to make clear that in certain situations the state courts did not have jurisdiction over child custody proceedings. Indeed. . . . Congress perceived the state and their courts as partly responsible for the problem it intended to correct.

The Court further noted,

> This conclusion is incapable from a reading of the entire statute, the main purpose of which is to curtail state authority

This Court has taken note that ICWA was intended to empower Indian tribes and to curtail state court power over Indian child custody mattes and that ICWA should be construed in accordance with the recognized intent of Congress. The construction of ICWA suggested by the Alaska Supreme Court stands in stark opposition to the recognized purposes of ICWA. Similar to this Court's comments in *Holyfield*, the conclusion of the Alaska Supreme Court "is incapable from a reading of the entire statute, the main purpose of which is to curtail state authority".

As noted by J. Rabinowitz in his dissent, given the principles of Indian law articulated by this Court, the conclusion that §1918 of ICWA and P.L. 280, taken together, divest tribes of concurrent jurisdiction over child custody matters, is inconsistent with the doctrine of inherent tribal sovereignty to. *In Re F.P.*, at 10.

CONCLUSION

For the foregoing reasons, the Alaska Supreme Court's decision should be reviewed and reversed by this Court. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL J. WALLERI

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Counsel of Record

March 18, 1993

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

IN THE MATTER OF F.P., W.M. AND A.M., Minor Children under the Age of Eighteen (18) Years.	File No. S-4742 4FA 91 37 CP OPINION [No. 3906 – December 18, 1992]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Mary E. Green and James A. Hanson, Judges.

Appearances: Michael J. Walleri & Lee D. Goodman, Jr., Tanana Chiefs Conference, Fairbanks, for Appellant Native Village of Circle. D. Rebecca Snow, Assistant Attorney General, Fairbanks, Charles E. Cole, Attorney General, Juneau, for Appellee State of Alaska.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

PER CURIAM.

RABINOWITZ, Chief Justice, dissenting.

In March 1991 the Alaska Department of Health and Social Services took emergency custody of F.P., W.M. and A.M. The Department filed a petition for temporary custody. The Native Village of Circle intervened and moved to dismiss the superior court proceeding, claiming exclusive jurisdiction over the custody matter. The superior court denied the motion to dismiss. We affirm.

Circle is without jurisdiction in this child custody dispute. This case is controlled by *Native Village of Nenana v. Department of Health & Social Services*, 722 P.2d 219

(Alaska 1986), *cert. denied*, 479 U.S. 1008 (1986), and *In re K.E.*, 744 P.2d 1173 (Alaska 1987). Circle asks that we review our holdings in these cases in light of recent opinions of the United States Court of Appeals for the Ninth Circuit, especially *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991).

The decision in *Native Village of Venetie* fails to persuade us that our prior cases should be overruled.[1] In concluding that the villages of Venetie and Fort Yukon had concurrent jurisdiction in child custody matters, the *Venetie* court held that these villages could be considered "sovereign," and therefore entitled to "the same rights and responsibilities as [ ] sovereign bands of native Americans in the continental United States," if they were "modern day successors to sovereign historical bands of natives." *Id.* at 559. This opinion is contrary to *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988), where we concluded that "the history of the relationship between the federal government and Alaska Natives . . . indicates that Congress intended that most Alaska Native groups not be treated as sovereigns." *Id.* at 34.

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[1] As the court of appeals observed in *Harrison v. State*, 791 P.2d 359 (Alaska App. 1990):

> Where a federal question is involved, the courts of Alaska are not bound by the decisions of a federal court other than the United States Supreme Court. The converse is also true; federal courts in Alaska are not bound by decisions of Alaska state courts on questions of federal law.

Id., at 363 n.7 (citations omitted).

Under 25 U.S.C. § 1918(a) (1988), any Alaskan Native group seeking to "reassume" jurisdiction over child custody matters must first petition the Secretary of the Interior for approval.[2] The Ninth Circuit recognized this in *Venetie. Venetie,* 944 F.2d at 555. Nevertheless, it concluded that neither the Indian Child Welfare Act (25 U.S.C. §§ 1901-63 (1988)) nor Public Law 280 prevents Alaskan Native groups from exercising concurrent jurisdiction over child custody matters. *Id.* at 562.

We reached an opposite conclusion in *Native Village of Nenana:*

> Our reading of 25 U.S.C. § 1918(a) indicates that Congress intended that Public Law 280 give certain states, including Alaska, exclusive jurisdiction over matters involving the custody of Indian children, and that those states exercise such jurisdiction until a particular tribe petitions to reassume jurisdiction over such matters,

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[2] Section 1918(a) provides:

> Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

The Act of August 15, 1953 is commonly referred to as "Public Law 280." Alaska has been a "Public Law 280" state since 1958. 72 Stat. 545 (1958).

> and the Secretary of the Interior approves [the] tribe's petition.

Native Village of Nenana, 722 P.2d at 221. Our analysis of the issue need not be repeated here. *See id.* at 221-22; *see also In re K.E.*, 744 P.2d at 1174. We remain convinced that our interpretation of § 1918(a) is correct. Nothing in *Native Village of Venetie* persuades us to change our opinion.

Since Circle has not successfully petitioned the Secretary of the Interior to reassume jurisdiction pursuant to 25 U.S.C. § 1918(a), it has no jurisdiction to decide child custody matters. The superior court therefore correctly denied Circle's motion to dismiss.[3]

AFFIRMED.

RABINOWITZ, Chief Justice, dissenting.

I dissent from this court's affirmance of the superior court's denial of Native Village of Circle's motion to dismiss the state's motion for temporary custody. The rationale for the court's opinion is that the superior court's ruling should be affirmed because Circle lacks jurisdiction to decide child custody matters since it has not as yet successfully petitioned the Secretary of Interior to reassume jurisdiction over child custody matters pursuant to 25 U.S.C. 1918(a).

Unlike the majority I am persuaded by the Ninth Circuit's analysis in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991) that our decisions in

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[3] We have reviewed Circle's remaining arguments and have concluded that they lack merit.

Native Village of Nenana v. Department of Health & Social Services, 722 P.2d 219 (Alaska 1986), *cert. denied*, 479 U.S. 1008 (1986) and *In re K.E.*, 744 P.2d 1173 (Alaska 1987) were incorrectly decided and should be overruled. It follows that I cannot join the majority in its reliance upon *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988) in support of its rejection of the Ninth Circuit's *Venetie* opinion. In brief, I adhere to the views I expressed in my dissent in *Native Village of Stevens*.

With the passage of the Indian Child Welfare Act (ICWA), Congress implemented the policy of promoting tribal integrity by establishing various procedural and substantive protections to govern Indian child custody matters.[1] "Significantly, the declaration of the Act's legislative purpose includes both the protection of 'the best

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[1] The policy of ICWA was based on the following congressional findings:

> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds –
>
> (1) that Clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
>
> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a

interests of Indian children' and the promotion of 'the stability and security of Indian tribes and families.' "[2]

To accomplish the federal policy of promoting tribal integrity by stopping the "wholesale separation of Indian children from their families,"[3] ICWA mandates specific

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direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901 (1988).

[2] Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. Rev. 1051, 1058 (1989); citing to § 1902. Section 1902 states:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

[3] H.R. Rep. No. 1386, 95th Cong., 2d Sess. 9, *reprinted in* 1978 U.S. Cong. & Admin. News 7530, 7531.

jurisdictional rules[4] and further mandates that federal, state, and tribal governments:

> [G]ive full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C. § 1911(d) (1988).

Alaska Native villages are recognized by Congress as "Indian tribes" for purposes of the ICWA. *See* 25 U.S.C.

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[4] 25 U.S.C. § 1911(a) provides:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

Section 1911(b) provides:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent of the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

§ 1903(8).[5] This court has previously acknowledged the rule of Alaskan tribal courts in Indian child custody matters. *See In re J.M.*, 718 P.2d 150 (Alaska 1986) (Village council operated under the code or custom of an "Indian tribe" and, under the ICWA, was vested with exclusive jurisdiction as a "tribal court" over matter of custody of Indian child and, in absence of a waiver, was not precluded from claiming same in proceedings in state court to place child in foster care and terminate natural mother's parental rights.).

Tribes have jurisdiction over their members by virtue of their inherent sovereignty. *See Montana v. United States*, 450 U.S. 544, 564 (1981) ("[T]he Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members."); *see also Duro v. Reina*, 495 U.S. 676, 685-86 (1990) ("the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order [and] . . . to prescribe and enforce rules of conduct for [their] own members."). A tribe's sovereign authority, moreover, is presumed until Congress affirmatively acts to take such authority away. *Native Village of Venetie*, 944 F.2d at 556; *see also United States v. Wheeler*,

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[5] Section 1903(8) states:

"Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43.

435 U.S. 313, 323 (1978) ("[U]ntil Congress acts, the tribes retain their existing sovereign powers.").

Given these principles, in my view it is inconsistent with the doctrine of inherent tribal sovereignty to conclude that § 1918[6] of the ICWA and Public Law 280, taken together, divest tribes of even concurrent jurisdiction over child custody matters. Such a conclusion can only be reached if Public Law 280 is interpreted as a divestiture statute.

It is on this point that I find Judge O'Scannlain's analysis in *Native Village of Venetie* persuasive. There Judge O'Scannlain wrote:

> The Supreme Court has also adopted the view that Public law 280 is not a divestiture statute. *See Cabazon Band of Mission Indians*, 480 U.S. at 207-12, 107 S. Ct. at 1087-90; *Bryan*, 426 U.S. at 383-90, 96 S. Ct at 2108-12; *see also Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990) ("Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their

---

[6] Section 1918 limits the jurisdiction granted in sections 1911(a) & (b). Section 1918(a) provides:

> Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 22, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

own members for violations of tribal law. Nothing in the wording of Public Law 280 or its legislative history precludes concurrent jurisdiction."). In *Bryan*, the Court observed that "nothing in [Public Law 280's] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private voluntary organization.' " 426 U.S. at 388, 96 S. Ct. at 2111 (quoting *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 717, 42 L. Ed. 2d 706 (1975)). The Court has rejected all interpretations of Public Law 280 which would result in an undermining or destruction of tribal governments.

. . . .

Finally, we note that Congress was aware, while drafting the Indian Child Welfare Act, that the U.S. Department of Justice viewed Public Law 280 as providing for concurrent jurisdiction among state and tribal courts. Then – Assistant Attorney General for legislative Affairs Patricia M. Wald wrote to Interior and Insular Affairs Committee Chairman Morris K. Udall: "As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, *unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-280.*" Letter from Assistant Attorney General Patricia M. Wald to Hon. Morris K. Udall (Feb. 8, 1978), included in H.R. Rep. No. 1386, 95th Cong. 2d

Sess. 35, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530, 7558 (emphasis added).

In spite of the foregoing, Alaska suggests that section 1918 of the Indian Child Welfare Act would be rendered meaningless by any non-divestiture interpretation of Public Law 280. However, the two statutes can be harmonized without construing Public Law 280 as a divestiture statute. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, 104 S.Ct. 2862, 2880, 81 L. Ed. 2d 815 (1984) (statutes capable of being harmonized should be so construed). The relevant portions of the Indian Child Welfare Act enable the Secretary of the Interior to grant to a tribe, upon receipt of a proper petition, exclusive jurisdiction (over all or a portion of the appropriate "Indian country") or referral jurisdiction of child-custody proceedings. *See* 25 U.S.C. § 1918(b)(2) (1988). Each of these types of jurisdiction is broader than any tribal jurisdiction which is concurrent with the states. Exclusive jurisdiction, of course, is clearly broader than concurrent jurisdiction. Likewise, referral jurisdiction is broader in scope than concurrent jurisdiction, in that referral jurisdiction is concurrent *but presumptively tribal* jurisdiction. *See id.* § 1911(b). Thus, there is something for a tribe to "reassume" under section 1918 – namely, exclusive or referral jurisdiction – even if Public Law 280 is read as not divesting the tribes of concurrent jurisdiction.

In sum, giving the benefit of doubt to Alaska, we conclude that Public Law 280 and the Indian Child Welfare Act are, at best, ambiguous as to whether states have exclusive or concurrent jurisdiction over child custody

> determinations where the tribe has not petitioned for exclusive or referral jurisdiction. Of course, ambiguities are to be resolved to the benefit of Indians. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403, 85 L. Ed. 2d 753 (1985). Accordingly, resolving the jurisdictional ambiguities in favor of the villages, we hold that neither the Indian Child Welfare Act nor Public Law 280 prevents them from exercising concurrent jurisdiction. If the native villages of Venetie and Fort Yukon are sovereign entities which may exercise dominion over their members' domestic relations, Alaska must give full faith and credit to any child-custody determinations made by the villages' governing bodies in accordance with the full faith and credit clause of the Indian Child Welfare Act.

Id. at 560-62.[7]

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[7] In regard to the majority's reliance on *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988), I reaffirm the views expressed in my dissenting opinion in that case and take this occasion to explicitly reiterate my conclusion that:

> As stated earlier I agree with the court that there has never been any express federal recognition of Alaska Native villages as tribes for purposes of sovereign immunity. However, it is equally clear that Congress has never expressly denied sovereign immunity to these villages. The unfortunate but inescapable fact is that Congress has steadfastly avoided defining the extent and limits of Native sovereignty in Alaska. Illustrative of this fact are the recent "1991" amendments to ANCSA, in which Congress declared, "[N]o provision of this Act shall . . . confer on, or deny to, any Native organization any degree of sovereign governmental authority over lands . . . or persons in Alaska. . . . " Alaska Native Claims Settlement Act

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Amendments of 1987, Pub. L. No. 100-241, § 2(8)(B), 101 Stat. 1788, 1789 (1988). *See also id.* § 17(a), 101 Stat. 1814. The Senate Report on the bill stated:

> . . . .
>
> This is an issue which should be left to the courts in interpreting applicable law and that these amendments should play no substantive or procedural role in such court decisions.

S. Rep. No. 201, 100th Cong. 1st Sess. 23 (1987), U.S. Code Cong. & Admin. News 1988, pp. 3269, 3274.

Thus, it appears that Congress has chosen to abdicate to the courts on this issue. In the absence of any express federal recognition or waiver of sovereign immunity, this court is bound to follow the common law principles of tribal sovereign immunity announced by the Supreme Court. In my view the court's opinion fails to do this.

Id. at 49-50.

APPENDIX B

TANANA CHIEFS CONFERENCE
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Michael J. Walleri
Alicemary L. Closuit
Attorneys for the Native Village of Circle

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

IN THE MATTER OF:	)
PIZARRO, Floralinda, d.o.b. 04/25/85	)
MARTINEZ, William, d.o.b. 06/16/88	)
MARTINEZ, Anthony, d.o.b. 11/06/89	)
Minor Children Under the Age of Eighteen (18) Years.	)

Case No. 4FA-91-37 CP

ORDER

(Filed June 28, 1991)

[Motion to Dismiss Denied]

~~Intervener, the Native Village of Circle, having moved to dismiss this action based upon the prior exclusive jurisdiction of the Native Village of Circle, and this Court being fully advised in the premises,~~

IT IS HEREBY ORDERED that this case is dismissed.

DATED this 27 day of June, 1991 at Fairbanks, Alaska.

/s/ James A. Hanson
JUDGE OF THE
SUPERIOR COURT
James A. Hanson

APPENDIX C

25 USC § 1360. State civil jurisdiction in actions to which Indians are parties.

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State Except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State Except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(As amended July 10, 1984, Pub.L. 98-353, Title I, § 110, 98 Stat. 342.)

25 USC § 1911. Indian tribe jurisdiction over Indian child custody proceedings.

(a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the

Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity. (Pub. L. 95-608, Title I, § 101, Nov. 8, 1978, 92 Stat. 3071.)

25 USC § 1918. Reassumption of jurisdiction over child custody proceedings.

(a) Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act

of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b)(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) Whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) The size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) The population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) The feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title

over limited community or geographic areas without regard for the reservation status of the area affected.

(c) If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected States or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable to [sic] tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title. (Pub.L. 95-608, Title I, § 101, Nov. 8, 1978, 92 Stat. 3074.)

APPENDIX D

D1

In the Superior Court of the State of California
IN AND FOR THE COUNTY OF SANTA CLARA

STATE OF CALIFORNIA,)
)
COUNTY OF SANTA CLARA)

I, ANNA L. OLLINGER, COMMISSIONER, one of the ~~Judges~~ COMMISSIONERS of the Superior Court of said State and County, do hereby certify that GRACE K. YAMAKAWA, County Clerk, whose name is subscribed to the foregoing Certificate of Attestation, now is, and was at the time of signing and sealing the same, Clerk of Santa Clara County, State of California, and ex-officio Clerk of said above named Court and keeper of the Records and Seals thereof, duly elected and qualified; that full faith and credit are and of right ought to be given to all of his official acts as such in all Courts of Record and elsewhere; that said signature is genuine, and that his said attestation is in due form of law and by the proper officer.

[SEAL] Given under my hand this APR 12 1991 day of _____ A.D. 19__.

/s/ Anna L. Ollinger
Judge of the Superior Court of the State of California, is and for the County of Santa Clara.
ANNA L. OLLINGER
COMMISSIONER

STATE OF CALIFORNIA,)
)
COUNTY OF SANTA CLARA)

I, GRACE K. YAMAKAWA County Clerk, Clerk of Santa Clara County, and ex-officio Clerk of the Superior Court in and for said County and State, do hereby certify that ANNA L. OLLINGER COMMISSIONER, whose genuine signature appeared to the foregoing certificate, was, at the time of signing the same, one of the ~~Judges~~ COMMISSIONER of the Superior Court of the State of California, in and for the County of Santa Clara, duly commissioned and qualified: that full faith and credit are and of right ought to be given to all his official acts, as such, in all Courts of Record and elsewhere.

[SEAL] In Testimony Whereof, I have hereunto set my hand, and affixed the seal of said Court, at my office, this APR 12 day of _____ A.D. 19__

/s/ Grace K. Yamakawa
County Clerk and ex-officio Clerk of the Superior Court of the State
Illegible

THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA
JUVENILE COURT

No. JD00165 Date: FEB 27 1990

Name: /s/ William Martinez 6-16-88

/s/ Anthony Martinez 11-6-89

PRESENT BEFORE THE COURT:

[ ] MINOR [X] ___ MOTHER [X] ___ FATHER

R. Kip Indian Center

_____

_____

Present: Atty. M. Walleri (by phone from Alaska)

HON. ANNA L. OLLINGER, JUDGE
M. DEMONJA, CLERK
M. TORREANO, REPORTER
JPO/DSS COURT OFFICER: N. BRADLEY,

DISTRICT ATTORNEY: D. THOMAS,

COUNTY COUNSEL: M. DE ANDA,

PUBLIC DEFENDER: T. Spielbauer/m,

ATTORNEY(S): D. Nadler/f.

NATURE OF PROCEEDINGS:

* * *

[X] TRIAL SETTING/I. D. OF COUNSEL

* * *

[X] ORIGINAL PETITION;
Date Filed: 2-6-90

* * *

THE COURT ORDERS:

* * *

[X] Petition filed 2-6-90, 2-16-90
is [ ] Off Calendar; [X] Dismissed;
[ ] CASE DISMISSED re Sec. 300 Welf, Inst. Code;

* * *

[X] Motion to intervene granted.

[X] Proceedings transferred to Native Village of Circle pursuant to USC-911 Subsection b.

* * *

/s/ Anna L. Ollinger

APPENDIX E

UNITED STATES DEPARTMENT OF THE INTERIOR
(SEAL) (SEAL)
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Mr. Michael Stancampiano
Superintendent, Fairbanks Agency
Federal Building & Courthouse Oct 04 1991
101 12th Avenue – Box 16
Fairbanks, Alaska 99701

Dear Mr. Stancampiano:

We have received the results of the election held on August 20, 1991, by the qualified voters of the Circle Native Community. The election was called in accordance with an order issued on June 25, 1991, by the Assistant Secretary – Indian Affairs which permitted the qualified voters of the Circle Native Community to vote on the adoption or rejection of a proposed constitution.

As evidenced by the completed Certificate of Results of Election, the Constitution of the Circle Native Community, Alaska, was duly adopted by a vote of 21 for an 1 against in an election in which at least thirty percent (30%) of the 39 members registered and entitled to vote cast their ballots.

You will note that the enclosed certificate refers to the Circle Native Community rather than "tribe" since "community" is the word used in the document itself. You will also note that the language of the approval certificate has been modified. The Native Village of Circle does not currently own any land according to our information. We have deleted the reference to lands it does not own. As modified, the language will also conform to the language provided counsel for the village on June 12, 1991.

The Constitution of the Circle Native Community, Alaska, is hereby approved pursuant to the authority granted to the Secretary of the Interior by the Act of June 18, 1934 (48 Stat. 984), as amended, and delegated to me by 230 D.M. 2.4, and in accordance with the terms of our authorization letter of June 25, 1991. Please deliver the enclosed original document to the Community.

Sincerely,

/s/ Eddie F. Brown
Assistant Secretary – Indian Affairs

Enclosure

cc: Area Director, Juneau
Superintendent, Fairbanks Agency
Michael J. Walleri, Tanana Chiefs Conference, Inc. 201 First Avenue, Fairbanks, Alaska 99701-4897
Chief, Circle Native Council, P.O. Box 8, Circle, Alaska 99733
Scott Keep, Assistant Solicitor, Tribal Gov't & Alaska, MIB 6456
Chief, Branch of Tribal Enrollment

CONSTITUTION
OF THE
CIRCLE NATIVE COMMUNITY

PREAMBLE

We, the Alaska Natives, residents of the State of Alaska, and citizens of the United States, constitute the Native Community of Circle, Alaska, and by this declaration we

assert our freedom as a sovereign people in a dependent association with the United States of America. As such, we do ordain and institute this constitution to promote our community's social, economic and political progress by authority of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Acts of June 15, 1935 (49 Stat. 378), May 1, 1936 (49 Stat. 1250), and November 1, 1988 (102 Stat. 2938).

ARTICLE I – NAME

The name of this organization shall be the Circle Native Community.

ARTICLE II – TERRITORY

The jurisdiction of the Circle Native Community shall extend to all lands constituting the dependent Indian Community of Circle as defined by Federal law.

ARTICLE III – MEMBERSHIP

Section 1. Basic Membership. The basic membership of the Circle Native Community shall consist of all Alaska Natives whose names appear on the roll of Circle Native Community approved by the Secretary of the Interior on March 13, 1990; provided that, the council may correct the basic membership subject to the approval of the Secretary of the Interior.

Section 2. Qualifications for Membership. Any person of at least one-quarter (1/4) degree Alaska Native or other Federally recognized American Indian blood who meets any

of the following qualifications shall be eligible to be a member of the Circle Native community:

(a) is at least one-quarter (1/4) degree Alaska Native or other Federally recognized American Indian blood; and has physically resided in the Native Village of Circle, Alaska, for a period of at least one (1) year immediately prior to the date of application for membership; or

(b) is descended from an enrollee to Circle under:
1. the terms of the Alaska Native Claims Settlement Act, as amended; or
2. the basic membership roll approved by the Secretary of the Interior pursuant to Section 1 of this Article.

Section 3. Regulation of Membership. The council shall have the power to enact ordinances and resolutions, not inconsistent with this constitution and subject to the review of the Secretary of the Interior prescribing rules and regulations governing membership, including application and appeal procedures, loss of membership, and adoption of members. The council shall have the power to adopt ordinances, subject to the review of the Secretary of the Interior, to extend the privilege of membership for community purposes to persons not otherwise eligible under Section 2 of this Article. Such persons shall not be entitled to hold elective office or vote in village elections pursuant to this constitution.

ARTICLE IV – GOVERNING BODY

Section 1. Name. The governing body of the Circle Native Community shall be the Circle Community Council hereinafter referred to as the council.

Section 2. Composition. The council shall include a first chief, second chief, secretary, treasurer and one (1) council member.

ARTICLE V – ELECTIONS

Section 1. Voter Qualifications. Any duly enrolled member of the Circle Native Community eighteen (18) years of age or older and who has resided for at least one (1) year in the community prior to an election shall be entitled to vote in all community elections.

Section 2. Qualifications of Candidates. Any duly enrolled member of the community who is at least eighteen (18) years of age on the date of the election and who has resided for at least one (1) year in the community prior to the election shall be eligible to become a candidate for election to membership on the council and serve in that capacity provided that no persons shall be a candidate for more than one (1) position in any election.

Section 3. First Election. The first regular election of officials under this constitution shall be held within sixty (60) days of the effective date of this constitution at which time a system of staggered terms shall be established. At the first regular election under this document, the first chief, the secretary and one (1) council member shall be elected to hold office for a term of two (2) years. The second chief, and the treasurer shall be elected for a term

of one (1) year. Thereafter, all terms of office shall be for two (2) years. Members shall hold office until their successors are duly elected and seated.

Section 4. Nominations. The time, place, and manner of nominations shall be specified in the election ordinance adopted pursuant to Section 5 of this Article.

Section 5. Election Ordinance. An election ordinance, consistent with this constitution, shall be adopted by the council within six (6) months following the effective date of this constitution which shall set forth the procedures to be followed in conducting each of the various types of elections called for in this constitution, subsequent to the first election of officers in accordance with Section 3.

The ordinance shall include provisions for conducting all tribal elections by secret balloting, nomination of candidates, maintenance of a current list of eligible voters, and the settling of election disputes.

Further, the ordinance shall spell out the procedure and format to be used whenever it is necessary to submit petitions for any purpose to the council and set forth a procedure for determining the validity of such petitions.

Section 6. Election Board. There shall be an election board appointed by the council whose duties shall be to supervise, administer, and conduct all tribal elections. The election board shall certify the election of community officials within five (5) days after the election. No member of the election board shall at the same time be a member of the council or a candidate for a position on the council.

ARTICLE VI – REMOVAL, RECALL AND FORFEITURE

Section 1. Removal. Any council member or other official found guilty by the council of behavior involving gross misconduct in office or neglect of duty shall be removed from office if at least three (3) members of the council vote in favor of such removal. Voting must be by secret ballot and the first chief is entitled to vote. If the accused is a member of the council, the accused shall have the right to cast a secret ballot. Before any vote for removal is taken, the person subject to removal shall be given a written statement of the charges against him at least ten (10) days before the meeting of the council at which he is to appear and he shall be given an opportunity to answer any and all charges at the designated council meeting. If the person subject to removal fails to appear before the council, the council shall proceed with the vote as scheduled. The decision of the council shall be final. No member of the council shall preside over the meeting at which his removal is being considered.

Section 2. Recall. Community members shall have the power to recall any member of the council. The recall process shall be initiated by filing with the council a valid petition asking for such recall, signed by at least thirty percent (30%) of the eligible voters, and setting forth the reasons for the petition. Within thirty (30) days after receipt of a valid recall petition, the council shall call and conduct an election to consider the recall of the official named in the petition.

The election shall be conducted pursuant to the election ordinance. Once an individual has been subjected to

recall proceedings, he shall not again be subject to such action during the balance of his term of office.

Section 3. Forfeiture. If any member of the council shall be found guilty of a felony in any federal or state court, shall die, resign or is absent from three (3) successive meetings without being excused by the council, he shall automatically forfeit his office.

ARTICLE VII – VACANCIES

Section 1. Any office which has been vacated, whether it be by removal, recall or forfeiture, shall be filled by appointment of the council at its next meeting and such replacement shall serve the unexpired term of office.

ARTICLE VIII – POWERS

Section 1. The council shall have powers and responsibilities hereinafter provided, subject to any limitations imposed upon such powers by the statutes and laws of the United States.

(a) To consult, negotiate, contract or conclude agreements with Federal, State, and local governments on activities which may affect the Circle Native Community;

(b) To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior or his authorized representative so long as such approval is required by Federal law;

(c) To receive advice from and make recommendations to the Secretary of the Interior with regard to all appropriation estimates for all projects which are for

the benefit of members of the Circle Native Community prior to the submission of such estimates to the Office of Management and Budget and Congress;

(d) To acquire property and to accept gifts;

(e) To join and/or charter community housing authorities;

(f) To charter community enterprises, corporations and associations;

(g) To prescribe rules and regulations governing future membership, loss of membership and the adoption of members;

(h) To administer community assets and manage all economic affairs and enterprises of the community, including the lease, sale or other disposition of lands owned by the community;

(i) To promote the peace, safety, health and general welfare of the members of the community;

(j) To enact ordinances and regulations consistent with this constitution for the conduct and administration of all tribal elections, the appointment of an election board and the regulations of its duties;

(k) To levy and collect taxes, fees and assessments from members for community purposes; and

(l) To administer justice by serving as or establishing a Village court, and defining its duties and powers consistent with Federal law and Circle Village Judicial Code;

(m) To encourage and foster the arts, crafts, traditions, language and culture of the community.

Section 2. Any rights and powers heretofore vested in the Circle Native Community but not expressly referred

to in this constitution shall not be lost by reason of their omission, but may be exercised by the council, upon approval by referendum.

ARTICLE IX – POPULAR PARTICIPATION IN GOVERNMENT

Section 1. Initiative. The eligible voters of the community shall have the right to propose legislation and vote by secret ballot to determine whether it will be adopted or rejected. Upon receipt of a valid petition signed by at least thirty percent (30%) of the eligible voters, the council shall call an election to be conducted by the election board no later than thirty (30) days after receipt of the petition. An affirmative vote by at least a majority of the eligible voters shall be required to determine the issues or questions submitted to the voters.

Section 2. Referendum. The council by an affirmative vote of at least three (3) of its members shall call an election to be conducted by the election board within thirty (30) days of such council decision for the purpose of deciding by secret ballot issues or questions that are within the authority of the council. An affirmative vote by at least a majority of the eligible voters shall be required to determine the issue or question submitted to the voters.

Section 3. The decision of the voters in both initiative and referendum elections shall be binding on the council and the community and shall remain in full force until amended or rescinded by subsequent action of the voters or expires by its own terms.

ARTICLE X – RIGHTS OF MEMBERS

Section 1. All members of the community shall enjoy without hindrance equal rights of life, liberty and the pursuit of happiness.

Section 2. This constitution shall not in any way alter, abridge or otherwise jeopardize the rights and privileges of the members of the community as citizens of the State of Alaska or the United States.

Section 3. The individual property rights of any member of the Circle Native Community shall not be altered, abridged or otherwise affected by the provisions of this constitution.

Section 4. Community members shall have the right to review all council records including financial records at any reasonable time in accordance with procedures established by the council.

Section 5. The Circle Native Community in exercising its powers of self-government shall not:

(a) Make or enforce any law prohibiting the full exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(b) Violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(c) Subject any person for the same offense to be twice put in jeopardy;

(d) Compel any person in any criminal case to be a witness against himself;

(e) Take any private property for public use without just compensation;

(f) Deny to any person in a criminal proceeding the right to a speedy trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, at his own expense, to have the assistance of counsel for his defense;

(g) Require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one (1) offense any penalty or punishment greater than imprisonment for a term of one (1) year or a fine of $5,000.00, or both;

(h) Deny to any person within its jurisdiction the equal protection of its laws or deprive any persons of liberty or property without due process of law;

(i) Pass any bill of attainder or ex post facto law;

(j) Deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six (6) persons.

ARTICLE XI – DUTIES OF OFFICERS

Section 1. Newly elected officers shall assume their respective office and duties immediately upon being elected and seated.

Section 2. The first chief shall preside at all meetings of the community and of the council and shall execute on behalf of the community all contracts, leases or other

documents approved by the council. He shall vote in all council matters before the council. He shall have general supervision of all other officers, employees and committees of the community and see that their duties are properly performed. When the council is not in session, he shall be the official representative of the community.

Section 3. The second chief shall assist the first chief when called upon to do so. In the absence of the first chief, he shall preside and when so presiding shall have all the rights, privileges, duties and responsibilities of the first chief.

Section 4. The secretary shall keep the minutes of all meetings and shall attest to the enactment of all resolutions and ordinances. Copies of all minutes, resolutions, and ordinances shall be submitted by him to the local Bureau Agency Superintendent as soon after enactment as possible. The secretary shall issue notices of all meetings and elections and conduct all general correspondence as directed by the council. The treasurer shall carry out the financial directives of the council, receive all local monies and keep an accurate account of the receipts and disbursements. Funds shall be deposited in the Circle Native Community's account in a local bank selected by the council where depositor's funds are insured by the Federal Deposit Insurance Corporation. All disbursements shall be made by check in accordance with resolutions of the council.

* * *

shall be collected and made available to community members and others affected upon reasonable request.

Section 7. All meetings shall be conducted in accordance with Robert's Rules of Order.

Section 8. Regular meetings of the general membership of the Circle Native Community shall be held at least twice annually. The date, time and place of such meetings shall be determined by the council. Special meetings of the general membership may be called by the first chief and shall be called by him upon receipt of a petition signed by at least thirty percent (30%) of the members of the Circle Native Community.

Section 9. A quorum of the general membership shall consist of twenty-five percent (25%) of the Circle Native Community. No business shall be conducted unless a quorum is present.

ARTICLE XIII – SEVERABILITY

If any provision of this constitution shall, in the future, be declared invalid by a court of competent jurisdiction, the invalid provision shall be severed and the remaining provisions shall continue in full force and effect.

ARTICLE XIV – AMENDMENTS

Section 1. This constitution may be amended by a majority vote of the qualified voters of the Circle Native Community voting in an election called for that purpose by the Secretary of the Interior or his authorized representative, provided that at least thirty percent (30%) of those entitled to vote shall vote in such election. No amendment shall become effective until approved by the Secretary of the Interior or his authorized representative.

Section 2. It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment at

the request of the council or upon receipt of a petition signed by at least thirty percent (30%) of the qualified voters of the Circle Native Community.

ARTICLE XV – ADOPTION

This constitution when adopted by a majority vote of the qualified voters of the Circle Native Community voting at an election called for that purpose by the Secretary of the Interior or his authorized representative in which at least thirty percent (30%) of those entitled to vote shall vote, shall be submitted to the Secretary of the Interior for his approval, and shall be effective from the date of his approval.

CERTIFICATE OF RESULTS OF ELECTION

Pursuant to a Secretarial election authorized by the Assistant Secretary – Indian Affairs on June 25, 1991, the attached Constitution of the Native Village of Circle, Alaska was submitted to the qualified voters of the tribe and on August 20, 1991, was duly (adopted) by a vote of 21 for and 1 against and 0 cast ballots found spoiled or mutilated in an election in which at least thirty (30) percent of the 39 members entitled to vote, cast their ballot in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378), the Act of May

1, 1936 (49 Stat. 1250), and the Act of November 1, 1988 (102 Stat. 2938).

/s/ Michael J. Stansampiano
Michael J. Stansampiano,
Chairman
Election Board

/s/ Louie A. John
Louie John, Member
Election Board

/s/ Angela M. Ludwick
Angela Ludwick, Member
Election Board
(Allen John,
Alternate Member)

August 20, 1991
Date

Supreme Court, U.S.
FILED
APR 21 1993
OFFICE OF THE CLERK

No. 92-1536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CIRCLE NATIVE COMMUNITY,

Petitioner,

v.

STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALASKA SUPREME COURT

Brief of Amici Curiae Native Village of Kluti Kaah, Native Village of Tyonek, Native Village of Tatitlek, Native Village of Chenega Bay and Native Village of Port Graham In Support of Petition For Writ of Certiorari to the Supreme Court of the State of Alaska

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INTEREST OF *AMICI CURIAE*[1]

The Native Villages of Kluti Kaah, Tyonek, Chenega Bay, Port Graham and Tatitlek are representative of the roughly 200 Native tribes in Alaska that have governed local matters according to custom and tradition from time immemorial. Tyonek, Chenega Bay, and Tatitlek reorganized their governments pursuant to the provisions of the Indian Reorganization Act, while the other villages maintain traditional council forms of government. Each *amici* village is directly and adversely affected by the Alaska Supreme Court's ruling in this case, and by the refusal of that court to accept the contrary holdings of the Court of Appeals for the Ninth Circuit.

Nearly all of the 200 Native villages in Alaska have tribal governments which exercise authority over child custody matters affecting members. They also, to varying degrees, exercise authority over non-member residents whose actions directly affect the health, welfare and economies of their communities. The institutions utilized by the tribes for governance include courts, elders councils and various other institutions similar to those employed by Indian tribes in the remainder of the United States. The federal courts acknowledge the authority, or potential authority, of the villages in such matters, but Alaska's courts have rejected these decisions. The result is a scenario in which tribal authority is recognized when a case is litigated in federal court, but not when it is litigated in state court. The Alaska Supreme Court's ruling denies Alaska's Native tribes any semblance of the

[1] The written consent of the parties to the filing of this brief is filed herewith.

inherent rights and powers of tribal self-governance recognized by numerous decisions of this Court and Acts of Congress. It also frustrates the implementation of the Indian Child Welfare Act as it pertains to tribal control over Indian children.

The petition for a writ of certiorari should be granted because the decision below: 1) is in direct and explicit conflict with a ruling of the Ninth Circuit Court of Appeals as well as other federal courts respecting the effect of Public Law 280 and the Indian Child Welfare Act on concurrent tribal jurisdiction; 2) negates the central purposes of the Indian Child Welfare Act to limit state court action and increase the role of tribal court jurisdiction; and 3) is in direct conflict with federal court decisions respecting the tribal status of Alaska Native villages.

I. THE RULING BELOW IS INCONSISTENT WITH EVERY OTHER COURT'S INTERPRETATION OF THE INDIAN CHILD WELFARE ACT AND PUBLIC LAW 280

The ruling below holds that the Circle Native Community "has no jurisdiction to decide child custody matters." App. A4. In so ruling, the court relied on the very act of Congress passed to limit state jurisdiction and expand tribal authority over Indian children—the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.* While acknowledging that the Ninth Circuit Court of Appeals had reached the opposite conclusion in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991) (hereinafter *Native Village of Venetie*), the Alaska Supreme Court, without analysis, rejected the Ninth Circuit's holding. It relied entirely on its earlier decision in *Native Village of Nenana v. Department of Health & Social Services*,

722 P.2d 219 (Alaska), *cert. denied*, 479 U.S. 1008 (1986) (*Nenana*), which held that:

> Our reading of 25 U.S.C. § 1918(a) indicates that Congress intended that Public Law 280 [67 Stat. 588] give certain states, including Alaska, exclusive jurisdiction over matters involving the custody of Indian children, and that those states exercise such jurisdiction until a particular tribe petitions to reassume jurisdiction over such matters, and the Secretary of the Interior approves [a] tribe's petition.

722 P.2d at 221. This conclusion is flatly contradicted by the Ninth Circuit Court of Appeals, by the purposes underlying the Indian Child Welfare Act, and is inconsistent with settled law governing termination of tribal powers.

The Indian Child Welfare Act (ICWA) was passed to halt abusive state child welfare practices that had resulted in "the wholesale removal of Indian children from their homes, . . . the most tragic aspect of Indian life today." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989), *quoting* Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (statement of William Byler). Congress found:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions;

25 U.S.C. § 1901. Congress also explicitly found that the States "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). "[T]he ICWA thus, in the words of the House Report accompanying it, seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." *Holyfield*, 490 U.S. at 37. The Act explicitly defines "Indian tribe" to include "any Alaska Native village as defined in section 1602(c) of Title 43." 25 U.S.C. § 1903(8).

The Alaska Supreme Court's decision deprives over 200 Alaska Native villages of the ability to adjudicate child custody matters pursuant to the ICWA's tribal forum preference. 25 U.S.C. § 1911(a) and (b). The decision not only conflicts with the language and purpose of ICWA, it is also contrary to the entire thrust of this Court's opinions recognizing the inherent tribal authority of Indian tribes over their children. While in many areas the precise scope of tribal jurisdiction is dependent on the facts of particular cases, this Court has repeatedly recognized and favored tribal authority over internal matters involving children. *Compare Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989), *with Mississippi Band of Choctaw Indians*

v. Holyfield, 490 U.S. 30, 42 (1989) (*citing cases*), and *Fisher v. District Court*, 424 U.S. 382 (1976). Nevertheless, the Alaska Court would require Alaska tribes to petition the Secretary of the Interior pursuant to 25 U.S.C. § 1918 in order to "reassume" the power to exercise concurrent authority over Indian child custody matters.

As the Petitioner correctly points out, the decision of the Alaska Court is in direct and express conflict with the Ninth Circuit Court of Appeal's decision in *Native Village of Venetie, supra.* In that case the Court of Appeals held that Alaska tribes retain concurrent jurisdiction over domestic relations matters, and thus do not have to petition to "reassume" their concurrent jurisdiction pursuant to § 1918 of ICWA.[2]

The Court of Appeals is correct. Public Law 280 did not, as the Alaska Court has held, "give certain states, including Alaska, exclusive jurisdiction over matters involving the custody of Indian children . . . ."

---

[2] The Ninth Circuit determined that a tribe in a P.L. 280 state might, pursuant to § 1918, petition the Secretary to reassume *exclusive* or *mandatory transfer* jurisdiction:

> Each of these types of jurisdiction is broader than any tribal jurisdiction which is concurrent with the states. Exclusive jurisdiction, of course, is clearly broader than concurrent jurisdiction. Likewise, referral jurisdiction is broader in scope than concurrent jurisdiction, in that referral jurisdiction is concurrent *but presumptively tribal* jurisdiction. *See id.* § 1911(b). Thus, there is something for a tribe to "reassume" under section 1918—namely, exclusive or referral jurisdiction—even if Public Law 280 is read as not divesting the tribes of concurrent jurisdiction.

944 F.2d at 561.

Nenana, supra, 722 P.2d at 221. Rather, as the Ninth Circuit has held:

> Public Law 280 was designed not to supplant tribal institutions, but to supplement them.
>
> The Supreme Court has also adopted the view that Public Law 280 is not a divestiture statute. *See Cabazon Band of Mission Indians,* 480 U.S. at 207-12, 107 S.Ct. at 1087-90; *Bryan,* 426 U.S. at 383-90, 96 S.Ct. at 2108-12; *see also Walker v. Rushing,* 898 F.2d 672, 675 (8th Cir. 1990) ("Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law. Nothing in the wording of Public Law 280 or its legislative history precludes concurrent jurisdiction.").

Native Village of Venetie, supra, 944 F.2d at 560. The Ninth Circuit's interpretation of Public Law 280 is consistent with subsection (c) of the Act which contemplates the ongoing vitality of tribal governmental authority by requiring affected states to give full force and effect to "any tribal ordinance or custom heretofore *or hereafter adopted* by an Indian tribe, band, or community in the exercise of any authority which it may possess . . . ." 28 U.S.C. § 1360(c) (emphasis added). Alaska's insistence on interpreting Public Law 280 as extinguishing tribal authority is in irreconcilable conflict with this Court's decisions in *Bryan v. Itasca County,* 426 U.S. 373 (1976), *Three Affiliated Tribes of Ft. Berthold v. Wold,* 476 U.S. 877 (1986), and *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987). As this Court concluded in *Bryan:*

> [N]othing in [Public Law 280's] legislative history remotely suggests that Congress meant the Act's

> extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private voluntary organizations.'

426 U.S. at 388 (citations omitted).

The Alaska Supreme Court neither mentioned nor discussed this Court's Public Law 280 precedents in its ruling that Public Law 280 extinguished tribal jurisdiction. *See Nenana, supra,* 722 P.2d 219 (Alaska 1986); *reaffirmed* in *In Re K.E.*, 744 P.2d 1173 (Alaska 1987). Given the chance to revisit its interpretation in light of the Ninth Circuit's careful analysis, the Alaska Supreme Court simply stated that "[t]he decision in *Native Village of Venetie* fails to persuade us that our prior cases should be overruled," and in a footnote added:

> Where a federal question is involved, the courts of Alaska are not bound by the decisions of a federal court other than the United States Supreme court.

In Re F.P., App. A2. Thus, it is clear that the only means by which this conflict over the interpretation of Public Law 280 and the Indian Child Welfare Act will be resolved is through the exercise of this Court's discretion to review the decision below.

II. THE ALASKA SUPREME COURT'S RULING IS IN DIRECT CONFLICT WITH FEDERAL COURT DECISIONS ON TRIBAL STATUS

Local hostility to tribal status in Alaska has triggered substantial litigation in the state and federal courts. The results of this litigation reflect the State/federal conflict over tribal status, with state courts

denying tribal existence and federal courts affirming it. This is not surprising. As this Court noted in *United States v. Kagama*, 118 U.S. 375, 385 (1886), "the people of the states where they [Natives] are found are often their deadliest enemies."

In *Native Village of Venetie, supra*, the Ninth Circuit affirmed that the historical sovereign status of Alaska Native villages is no different than that of tribes elsewhere:

> Indian sovereignty flows from the historical roots of the Indian tribe. *See Wheeler*, 435 U.S. at 322-23. Tribal sovereignty exists unless and until affirmatively divested by Congress. *See id.* at 323. Thus, to the extent that Alaska's natives [*sic*] formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare, we perceive no reason why they, too, should not be recognized as having been sovereign entities. If the native [*sic*] villages of Venetie and Fort Yukon are the modern-day successors to sovereign historical bands of natives [*sic*], *the villages are to be afforded the same rights and responsibilities as are sovereign bands of native* [*sic*] *Americans in the continental* [*sic*] *United States.*

944 F.2d at 558-59. The conclusion that Alaska Native villages have the same tribal status and powers as tribes in the lower 48 states simply reiterates the holding of this Court 38 years ago in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). In *Tee-Hit-Ton* this Court unhesitatingly affirmed a Court of Claims decision that Alaska Natives possessed aboriginal tribal rights to the lands they occupied. In so

doing, the Court agreed that Tee-Hit-Ton Indians were a "clan of the Tlingit tribe," an "identifiable group of American Indians . . . residing in Alaska" and a "tribe" with "tribal" attributes. *Id.* at 273, 275, 279, 282, 285, and 286. The Court found "that land claims among the Tlingits, and likewise of their smaller group, the Tee-Hit-Tons, was [*sic*] wholly tribal. It was more a claim of sovereignty than of ownership." *Id.* at 287. On this basis the Court concluded "that the [Tee-Hit-Ton's] use of its lands was like the use of the nomadic tribes of the [Lower 48] States Indians." *Id.* at 288.

The significance of the Court's holding in *Tee-Hit-Ton* is its conclusion that Alaska tribal claims are indistinguishable from tribal claims of Native American groups elsewhere, and must be evaluated within the general framework of federal Indian law applicable to all aboriginal tribes in the United States. The Court explained:

> It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. * * * After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term.

Tee-Hit-Ton Indians, 348 U.S. at 279. The Ninth Circuit has followed this precedent.

In *In Re F.P.* (the decision below), the Alaska Supreme Court responded to the Ninth Circuit's *Venetie* decision with the brief statement that "[t]his

opinion is contrary to *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988), where we concluded that the history of the relationship between the federal government and Alaska Natives . . . indicates Congress intended that most Alaska Native groups not be treated as sovereigns. *Id.* at 34." App. A2. The *Stevens Village* opinion rests on the court's parochial assumptions that Alaska Natives *per se* are "different"; that the government's treatment of them has differed from its dealings with tribes elsewhere; and that, therefore, Alaska Native villages are not tribes and have no power over internal matters. 757 P.2d at 35-40. The court based these assumptions on some court decisions from early territorial days which denied that Alaska villages possessed tribal sovereignty, aboriginal rights, or occupied Indian country, without reference to principles of federal Indian law applicable elsewhere in the United States. *See, United States v. Seveloff*, 27 F. Cas. 1021 (D. Or. 1872); *Waters v. Campbell*, 29 F. Cas. 411 (C.C.D. Or. 1876); *Kie v. United States*, 27 F. 351 (C.C. Or. 1886); and *In re Sah Quah*, 31 F. 327 (D. Alaska 1886). These decisions were wrong when decided, and have been explicitly repudiated by the Ninth Circuit.[3] *Native Village of*

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[3] Earlier cases implicitly overruled them, *see, e.g., Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); *Tlingit and Haida Indians v. United States*, 389 F.2D 778, 782 (1968); *People of South Naknek v. Bristol Bay Borough*, 466 F. Supp. 870, 877 n.12 (D. Alaska, 1979), and *In re McCord*, 151 F. Supp. 132 (D. Alaska 1957) (affirming the existence of Indian country). For a detailed critical analysis of the early decisions cited in text, *see* Neidermeyer, *"The True Interest of a White Population": The Alaska Indian Country Decisions of Judge Matthew P. Deady*, 21 N.Y.U. J. of Intl. L & Politics 195 (1988). Even the Solicitor

Venetie, supra, 944 F.2d at 558.

The conflict here is remarkably similar to that in *United States v. John,* 437 U.S. 634 (1978), in which this Court reviewed a decision of the Mississippi Supreme Court (*John v. State,* 347 So.2d 959 (Mississippi 1977)) holding that the Choctaw Indians of Mississippi did not constitute an Indian tribe subject to federal jurisdiction because they had been "assimilated into the social and political life of the State and that the federal government long ago abandoned its supervisory authority over the Indians." 437 U.S. at 652. Similarly, the Alaska Supreme Court based its negative conclusion regarding tribal status of Alaska Native villages on a lapse in federal jurisdiction and purported assimilation into non-Native society. *Native Village of Stevens,* 757 P.2d at 35-36. The erroneous reasoning of the court below is comparable to that rejected in *John* and can only be corrected by this Court.

The State admits that there are some 200 Native "entities" in Alaska that may call themselves tribes and even act like tribes. According to the State, however, they are nothing more than social clubs with membership based on race and utterly lacking in governmental powers. The State's intractable opposition to Native tribal status is not merely a theoretical difference of opinion. It directly affects daily life in the villages. The State, for example, refuses to recognize the validity of existing tribal court adoptions.

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for the Department of the Interior, in a point-by-point analysis, recently rejected the Alaska Supreme Court's reasoning with respect to tribal status. "Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers" at 48-58. Op. No. M-3675 (Jan. 11, 1993).

Native Village of Venetie, supra. As a result, Native adoptive parents have been denied Aid to Families with Dependent Children (AFDC) and other benefits unless they secure legal representation, travel great distances, and utilize state courts to accomplish what has for generations been handled by local tribal custom and authority. Further, the State refuses to recognize tribal sovereign immunity from suit, thereby subjecting tribes to the threat of bankruptcy, foreclosure, loss of lands, and ultimately their very existence. *Native Village of Stevens, supra.* The State likewise refuses to recognize tribal taxing power, which is indispensable to the provision of critical social services and the effective operation of tribal governments. *Alaska, ex rel. Yukon Flats School District v. Native Village of Venetie,* 856 F.2d 1384 (9th Cir. 1988).

The conflict between the Alaska courts and the federal courts is best illustrated by the recent developments in *Chilkat Indian Village v. Johnson,* No. J84-024, *slip op.* (D. Alaska Oct. 9, 1990), where the Federal District Court for Alaska held that Chilkat Indian Village is a federally recognized tribe *and* Indian country. Accordingly, the case was remanded to tribal court for a ruling on the merits of a dispute over ownership of tribal artifacts which an art dealer seeks to acquire. *Chilkat Indian Village v. Johnson,* No. 90-01 (Chilkat Indian Village Tribal Court). The tribal court recently conducted a four-week trial, at which it heard extensive testimony from tribal elders respecting the meaning of tribal law and the ownership of artifacts according to Tlingit law. Thus, federal courts recognize the tribal status and powers of Native tribes and remand cases to tribal courts, while

the state courts operate as if tribal courts do not exist. This situation is similar to other circumstances in which this Court has exercised its discretionary authority to resolve conflicts between state and federal courts on federal Indian law questions. *See, e.g., Solem v. Bartlett*, 465 U.S. 463 (1984); *United States v. Washington State Comm. Fishing Passenger Vessel Ass'n.*, 443 U.S. 658 (1979).

CONCLUSION

The State's intractable opposition to Indian tribes and their inherent powers was unequivocally reaffirmed, albeit with little discussion or analysis, in the decision below. The legal reasoning underlying the Alaska Supreme Court's conclusion that tribes in Alaska have no sovereign powers is articulated in that court's earlier decision in *Stevens Village*; the reasoning underpinning the conclusion below that Public Law 280 divested Alaska tribes of their inherent sovereign powers is voiced in the earlier decision in *Nenana*. Given the opportunity to reevaluate these decisions in light of the Ninth Circuit's recent and careful analysis of the same issues, the Alaska Court simply dug in its heels. The conflict between the decisions of the Alaska Supreme Court and the Ninth Circuit Court of Appeals on these issues has produced an impasse over whether Alaska Native villages, specifically identified as Indian tribes in the Indian Child Welfare Act, must petition the Secretary of the Interior to "reassume" their concurrent jurisdiction over Indian child custody determinations. This impasse can only be resolved by this Court. *Amici* urge that the petition for a writ of certiorari be granted.

Respectfully submitted,

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NO. 92-1536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CIRCLE NATIVE COMMUNITY,

Petitioner,

v.

STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

On Petition For Writ of Certiorari To the Supreme Court Of The State of Alaska

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the courts of Alaska err in concluding that the Native Village of Circle lacked jurisdiction over F.P., W.M., and A.M.?

LIST OF PARTIES

The parties to the proceedings below are:

Petitioner: The Native Village of Circle

Respondent: The State of Alaska, Department of Health and Social Services

Mother: J.J.

Children: F.P., W.M. and A.M.

Guardian ad Litem: Office of Public Advocacy.

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NO. 92-1536

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Supreme Court of the United States

OCTOBER TERM, 1992

CIRCLE NATIVE COMMUNITY

Petitioner,

v.

STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

On Petition For Writ of Certiorari To the Supreme Court Of The State of Alaska

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Alaska, Department of Health and Social Services, opposes issuance of a Writ of Certiorari to review the decision of the Supreme Court of the State of Alaska in this case.

OPINION BELOW

The Alaska Supreme Court decision is published as Matter of F.P., 843 P.2d 1214 (Alaska 1992).

STATEMENT OF THE CASE

The Alaska Department of Health and Social Services, Division of Family and Youth Services (DFYS) first became involved with F.P., W.M. and A.M. late on March 4, 1991.[1] Their mother, J.J.,

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[1] Petitioner provides a summary of the prior course of events in California (Petition at 3-5), but no evidence of those events was introduced in the Alaska case. Only the two California orders transferring jurisdiction to the Native Village of Circle were produced and filed as foreign judgments in the Alaska case under Alaska's version of the Uniform Enforcement of Foreign Judgments Act, AS 09.30.200-270. Petitioner has partially reproduced one of those orders as its Appendix D.

was found by state police in her apartment, unconscious and intoxicated, bleeding from her foot. The children, 5 years, 2 years and 18 months old, were hungry and without appropriate supervision. When DFYS was called, it took emergency custody of the children.

Under Alaska law, a hearing must be held within 48 hours of notification to the court that emergency custody has been taken. AS 47.10.142. At that first hearing on March 6, 1991, an attorney appeared on behalf of the Native Village of Circle (Circle) claiming that it was the "Indian child's tribe" for F.P., W.M. and A.M. and had jurisdiction over the children pursuant to the Indian Child Welfare Act (ICWA). Circle filed its Motion to Intervene on

March 12, 1991, which DFYS did not oppose because it knew the children had maternal relatives in Circle. Intervention was granted March 27, 1991.

Circle also filed a Motion to Dismiss DFYS' custody proceeding which was briefed by all parties, including supplemental briefing requested by the court. On June 28, 1991, the superior court denied the Motion to Dismiss. Circle filed a timely appeal to the Alaska Supreme Court which resulted in the decision Circle Native Community (Community) now asks this court to review, Matter of F.P., 843 P.2d 1214 (Alaska 1992). App. A of Petition.

After it filed its appeal in the Alaska courts, Circle filed a Complaint for Injunctive and Declaratory Relief in

federal district court in September 1991, attacking the state court decision. That complaint was dismissed on March 16, 1993, on the State's Motion for Summary Judgment, as a collateral attack on a state court decision.

The state court continues to exercise its jurisdiction over these children. It recently extended their placement in state custody while their mother works to control her addiction to alcohol so that they may safely be returned to her.

REASONS FOR DENYING THE WRIT

I. Summary

Even though the Ninth Circuit and the Alaska Supreme Court have inconsistent interpretations of the

effect of Public Law 280, 25 U.S.C. § 1360, on the respective jurisdiction of Alaskan courts and tribal courts in Alaska, this petition does not present a factual context within which to resolve the conflict. The petitioner, Community, has never been a party to any of the proceedings below and is still not a party. Thus, under this court's rules, it cannot petition for a Writ of Certiorari. In addition, the entity originally asserting tribal jurisdiction over the children, the Native Village of Circle, has been found not to be the "Indian child's tribe" of F.P., A.M., and W.M., thereby mooting any claim it had made to jurisdiction over them.

II. The Petitioner was not a party to the proceedings below.

Community has asserted it is the proper party in interest even though it did not exist until after the events it asks this Court to review. Its constitution, drafted pursuant to the Indian Reorganization Act (IRA), was adopted by the members August 20, 1991, and approved October 4, 1991, by the Secretary of the Interior. App. E of Petition. All the events material to the state appellate decision whose review is urged by Community occurred on or before June 28, 1991. No mention of Community was ever made to the superior court when it was considering Circle's jurisdictional claim. As a result, neither the superior court nor the Alaska Supreme Court ruled on whether

Community could even be a party to the child protection proceeding. Matter of F.P. addresses only Circle's jurisdictional claim. 843 P.2d at 1216.

From the time its constitution was approved by the Secretary of the Interior in October 1991 to the present, Community has taken no steps to intervene in the state court proceeding or to substitute itself for Circle. Since it was not and is not a party to the proceedings below, it is not a party "interested ... in [the] judgment" who may petition for a Writ of Certiorari under Supreme Court Rule 12.2 and 12.4.

III. The subject of this petition is moot.

The Petitioner argues that the Alaska Supreme Court's decision in Matter of F.P., 843 P.2d 1214 (Alaska 1992), should be accepted on a Writ of Certiorari because it is inconsistent with certain Ninth Circuit rulings. Petition at 6. Although this conflict between the courts' decisions exists, this case does not present a valid tribal claim of jurisdiction.

Circle moved to dismiss the state court proceedings on the grounds that it had prior exclusive jurisdiction over the children under 25 U.S.C. § 1911(a). Petition, App. C at 1. A tribal court may assert exclusive jurisdiction under Section 1911(a) if the Indian children reside or are domiciled within the

tribe's jurisdiction or if the children are the wards of the tribal court. In this case Circle claimed the children were wards of its tribal court because a California court had granted Circle's request to transfer the children's case from the California court to Circle. Developments subsequent to the filing of Circle's appeal in the Alaska Supreme Court have established that the California orders transferring jurisdiction to Circle were based on Circle's misrepresentations regarding the children's eligibility to be members of Circle. Those orders have therefore been vacated, as has the Alaska superior court's order recognizing Circle as the children's tribe.

A. These children never were members or eligible to be members of the Native Village of Circle .

Following the Alaska Supreme Court's remand of the child protection case to the superior court, the trial court has vacated its earlier order granting Circle's intervention. App. 1. It did so after the state proved that Circle had misrepresented the children's status given the membership criteria in the constitution the Native Village of Circle adopted in 1970.[2] App. 2.

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[2] The 1970 constitution was the only constitution in effect both in 1990 when California had custody and in March 1991 when Alaska took custody. It may still be in effect since Community's 1991 IRA Constitution is for an entity with a different name, has different members, and contains no statements that it replaces the earlier constitution. The only link is a reference to the Native Village of Circle in the Certificate of

(continued...)

To be members of Circle, one had to be on an original roll or to be a later resident of the village. Since none of these children were born in 1970 they could not have been among the original members of Circle. Instead they would have had to qualify under Article III, Section 2:

> a. New members. All children of any member, who are residents of Circle shall be members of this Community.
>
> b. Any person who becomes a resident of Circle may be adopted by the Council by a majority vote in its regularly called meeting.

App. 2 (emphasis added).

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[2](...continued)
Results of Election (Petition, App. E at 15) and the Department of the Interior's cover letter. It is not uncommon to have IRA councils and traditional councils in the same village.

As Petitioner has explained, the children and their mother were residents of California in 1985 when California authorities first became involved with them. Petition at 3. In fact, the mother, like F.P., W.M. and A.M., had been born, reared, and spent all her life in California until Circle brought the family to Alaska. Petition at 4-5. Therefore neither the mother nor the children met the residency requirement for becoming members of Circle in 1990 when Circle induced the California court to transfer jurisdiction to it. Even when Circle brought the mother and children to Alaska, none of them resided in Circle; they all settled in Fairbanks. Petition at 5. They were therefore still not eligible to become

members by 1991 when DFYS took custody of the children, nor when Circle moved to intervene, nor when it moved to dismiss.

Since Circle had and has no legitimate claim of authority over these children, the superior court would have to deny Circle's Motion to Dismiss if this case were remanded for reconsideration of the issue. This Court's review of the original state courts' grounds for denial of Circle's Motion to Dismiss therefore would not affect the practical outcome of this case. Circle's inability to claim the children as members moots the issue of whether P.L. 280 gave states exclusive or concurrent jurisdiction over the custody of Indian children.

B. The California orders purporting to transfer jurisdiction to Circle have been vacated.

The California court transferred jurisdiction to Circle[3] in 1990 under 25 U.S.C. § 1911(b). See App. D at D-4.[4]

25 U.S.C. § 1911 only authorizes an "Indian child's tribe" to petition for transfer, not any other tribe that may have heard of the children. Since neither the mother nor the children were even eligible to be its members in 1990 or 1991, Circle did not fit within the

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[3] Petitioner asserts California transferred jurisdiction to Community in March 1990. Petition at 5. Community, however, did not come into existence until October 1991 when its constitution was approved. Petition, App. E.

[4] In reprinting this handwritten order for Appendix D, a typographical error was made in the federal citation which read "USC 1911, Subsection b" in the original.

definition of "Indian child's tribe" in the Indian Child Welfare Act. 25 U.S.C. § 1903(5)(a). Circle was never "[t]he Indian tribe in which [F.P., W.M. and A.M. were] member[s] or eligible to be ... member[s]." Id. It therefore had no standing in 1990 to petition the California court to transfer jurisdiction to Circle under 25 U.S.C. § 1911(b). Petition, App. C at 2. The California orders, having been induced by Circle's serious misrepresentation of the children's status and its own, were defective. They have been vacated by the superior court in Alaska for that reason, again, after remand from the state Supreme Court. App. 3.

Although Community appears to have abandoned any arguments regarding

Alaska's failure to give full faith and credit to California's order, Circle could only claim exclusive jurisdiction over F.P., W.M. and A.M., who were non-residents, based on California's transfer of jurisdiction under 25 U.S.C. § 1911(b) to the children's alleged tribe. Those orders having been vacated, Circle has no basis for a claim of exclusive jurisdiction over these children who remain non-residents and non-members of Circle.

IV. Misstatements of Fact and Law

A. The Circle Native Community has not proved in state court that these children are members.

Petitioner asserts that F.P., W.M. and A.M. are members of Community. Petition at 2. It has to date made no such claim to the Alaska Superior Court

in the on-going child protection case. It has not moved to intervene in that case since the court vacated its prior order granting Circle's intervention. App. 1. Neither the children nor their mother is listed in "the roll of Circle Native Community approved by the Secretary of the Interior" in March 1990, when the family was just being moved to Alaska. While the children or their mother may meet its qualifications for membership (App. E, Article III, Section 2, at E 3-4), Community has not produced any documents demonstrating that any of them do qualify or have been recognized as members by Community.

In the absence of any proof that the mother or children have applied for and have been accepted as members of

Community, the record in this case makes it unsafe to assume their membership. If the children and their mother are not members, even the children's eligibility for membership, were it proved, would not make them "Indian children" under ICWA. Lacking his or her own membership, a child must be both eligible and "the biological child of a member of an Indian tribe" to come within the terms of ICWA. 25 U.S.C. § 1903(4). If their mother[5] is not a member, the children's mere eligibility does not make them "Indian children" for ICWA's purposes.

B. Circle Native Community is not an Indian tribe recognized under the terms of ICWA.

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[5] The children's fathers are non-Natives.

The ICWA definition of "Indian tribe" is broad, but the portion of the definition that refers to Alaska (25 U.S.C. § 1903(8))is tied to the Alaska Native Claims Settlement Act. It provides that "Indian tribe" includes "any Alaska Native village as defined in section 1602(c) of Title 43...." Id. This provision in turn cross-references lists of villages eligible to participate in the claims settlement. 43 U.S.C. § 1602(c). Circle is on the list in 43 U.S.C. § 1610(b)(1) and is a tribe for purposes of ICWA.

The question remains of what entity is the legitimate governing authority of that village, Circle or Community. Community's 1991 constitution makes no reference to the Native Village of

Circle,[6] except for residence there as one possible basis for membership. The new constitution's effect on Circle's 1970 constitution, which was expressly for the Native Village of Circle, remains unclear as a result.

The Alaska amendment to the Indian Reorganization Act allows

> ...groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-

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[6] Community's reliance on Noatak v. Hoffman, 896 F.2d 1157 (9th Cir. 1990), reviewed on other grounds, sub nom. Blatchford v. Native Village of Noatak. ___ U.S. ___,111 S.Ct. 2578 (1991), is misplaced. Community was not involved in that case either. Rather the court was dealing with Circle's traditional council. Moreover Noatak found Circle to be a tribe only for the jurisdictional purpose of 28 U.S.C. § 1362. 896 F.2d at 1160; Native Village of Venetie IRA Council v. Alaska, 944 F.2d 548, 552 (9th Cir. 1991).

> defined neighborhood, community, or rural district, [to] organize to adopt constitutions and bylaws....

25 U.S.C. § 473(a). Mere approval of an IRA constitution for an Alaska Native village does not constitute recognition that the group adopting the constitution qualifies as a tribe with sovereign powers. State of Alaska v. Native Village of Venetie, 856 F.2d 1384, 1387 (9th Cir. 1988); see also Native Village of Venetie IRA Council v. Alaska, 944 F.2d 548, 4559 (9th Cir. 1991). In fact, when Community's constitution was approved, the Department of the Interior was careful not to use the word "tribe"

(Petition, App. E at 1) and to limit the significance of its approval.[7]

Community, given the ambiguity created by the new constitution, cannot avoid the need to establish before a court of competent jurisdiction that it is "the modern-day successor to [a] sovereign historical band[] of natives...." Venetie IRA, 944 F.2d at 559. No proof on this issue has been presented in the state court proceedings. In this context, Community's failure to claim to be the tribe of these children by moving to intervene in the on-going custody

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[7] Community failed to provide the Certificate of Approval in its reprint of the constitution for its Appendix E. That Certificate is reprinted as the State's Appendix 4.

proceeding at any time since its constitution was approved in October 1991 must be taken as a recognition that it has no standing to intervene in that proceeding.

Petitioner asserts that the Venetie IRA holding regarding the need to prove tribal status relates only "to the unique tribal structure of the Venetie IRA...." Petitioner at 8, n.4. This assertion ignores the express language of the Ninth Circuit, applying the proof requirement to both Venetie and Fort Yukon. 944 F.2d at 558-59. Moreover, the parties in Venetie IRA did not present any evidence of a unique tribal structure in Venetie. Id. at 550. That issue was raised only in the earlier

Venetie tax case, State of Alaska v. Native Village of Venetie, where the existence of multiple councils was significant because one of them had passed a tax ordinance. 856 F.2d at 1386. The Venetie example demonstrates that approval of Community's IRA constitution has complicated the question of what entity is the tribe at Circle, rather than simplifying it.

C. The Alaska Supreme Court's position does not create a conflict with other states.

Petitioner has argued that the Alaska Supreme Court's holding that P.L. 280 gave Alaska's state courts exclusive jurisdiction over child protection proceedings along with other civil causes of action creates a conflict with states like California. Community has

not identified a California Supreme Court decision that conflicts with the Alaska decisions. Rather its theory seems to be that a California court faced with a motion to transfer jurisdiction to an Alaskan village would inevitably rule differently than an Alaska court faced with the same motion, because P.L. 280 did not "subject Alaskan tribes to California jurisdiction." Petition at 10. However, Petitioner fails to understand that in cases like this one, the state's jurisdiction rests on the mother's and children's residence in that state, not on P.L. 280. Even if P.L. 280 created concurrent jurisdiction between the mandatory states and affected tribes, if the family lives outside the

reservation, the state would have jurisdiction. The P.L. 280 effect of giving Alaska exclusive jurisdiction over Alaska Natives in Alaska is therefore irrelevant to whether California has jurisdiction over its Indian residents who are not members of a California tribe.

The effect of P.L. 280 in Alaska becomes relevant to California only when an entity in Alaska requests a transfer of a custody proceeding under 25 U.S.C. § 1911(b). If the requesting Alaska tribe has not reassumed jurisdiction over such proceedings through the process that 25 U.S.C. § 1918 made available expressly for tribes in P.L. 280 states, no other state's courts can validly transfer a case to that Alaska

tribe. Other state's courts cannot be assumed to be familiar with the law on these matters as it affects tribes in Alaska. As a result, any attorney representing an Alaska tribe has an ethical duty to bring the relevant cases to the court's attention.

DR 7-106(B)(1). The meager documents available in this case from the California courts do not reveal any discussion of this legal issue. The conflict Circle hypothesizes is, therefore, really a strawman of Circle's own making.

CONCLUSION

Since Community is not a proper petitioner and Circle did not have grounds for asserting jurisdiction over

the children in this case, this Court should deny the requested Writ of Certiorari.

DATED at Fairbanks, Alaska, this 19th day of April, 1993.

CHARLES E. COLE
Attorney General
State of Alaska

D. REBECCA SNOW
Assistant Attorney General
Counsel of Record
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(907) 451-2823
Counsel for Respondent.

APPENDIX 1

IN THE SUPERIOR COURT FOR

THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

IN THE MATTER OF:	)
	)
[M], [A]	)
DOB: 11/6/89	)
	)
[M], [W]	)
DOB: 6/16/88	)
	)
[P], [F]	)
DOB: 4/25/85	)
	)
Minors Under the	)
Age of Eighteen (18)	)
Years.	)
	)

Case No. 4FA-91-37 CP

ORDER VACATING ORDER FOR INTERVENTION

This matter having come before the court on the Department's Motion to Vacate Order for Intervention, and the court having considered the parties' responses,

IT IS NOW ORDERED that the court's Order for Intervention entered March 28,

1991, is VACATED without prejudice to submission of a new motion by the appropriate entity which can establish that it is the Indian tribe of these children under 25 U.S.C. 1903(5).

DATED: February 19, 1993

/s/
Mary E. Greene
SUPERIOR COURT JUDGE

APPENDIX 2

CONSTITUTION AND BYLAWS

of the

Village of CIRCLE

Alaska

PREAMBLE

We, a group of residents of Circle, Alaska having a common bond of residence, in order to promote our welfare through the development of governmental and economic enterprises, do establish this Constitution and Bylaws.

ARTICLE I - NAME

The name of this organization shall be Native Village of Circle.

ARTICLE II - DEFINITION OF TERRITORY

The jurisdiction of this Council shall be in and around Circle Village. (Define here the exterior boundaries of your village where the jurisdiction of this Constitution and Bylaws will cover.)

ARTICLE III - MEMBERSHIP

Section I - All persons whose names shall appear on the census roll being all members of this village residing in Circle shall be the members of this Community.

Section 2 - a. New members. All children of any member, who are residents of Circle shall be members of this Community.

BYLAWS OF CIRCLE VILLAGE

...

ARTICLE VI - ADOPTION

This Constitution and Bylaws shall be in effect when _____ is agreed to by a majority vote of the village members ____ing in an election called for the purpose; Provided _____ at least 30 per cent of the voting membership take _____. The persons entitled to vote are all the adult residents in the village of Circle Alaska.

CERTIFICATION OF ADOPTION

We, the undersigned members of the village having _____ a chosen to be the election judges by the majority of _____ members, certify that we were present at an election called for the

purpose of adopting this Constitution and Bylaws on October 9, 1970; that the foregoing was duly adopted at such election by a vote of 11 for, and 0 against, where at least 30 per cent of those entitled to vote cast their ballots.

Albert Carroll Sr./s/
Chairman, President

Irving John Sr./s/
Chairman, Vice-Pres

APPENDIX 3

IN THE SUPERIOR COURT FOR

THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

IN THE MATTER OF:	)
	)
[M], [A]	)
DOB: 11/6/89	)
	)
[M], [W]	)
DOB: 6/16/88	)
	)
[P], [F]	)
DOB: 4/25/85	)
	)
Minors Under the	)
Age of Eighteen (18)	)
Years.	)
	)

Case No. 4FA-91-37 CP

ORDER VACATING CALIFORNIA ORDERS

This matter having come before the court on the Department's Motion to Vacate California Orders, and the court having considered the parties' responses,

IT IS NOW ORDERED, under Civil Rule 60(b), that the orders of the Superior

Court of the State of California, County of Santa Clara Juvenile Court, purporting to transfer jurisdiction of its child protection proceedings involving Florinda Pizarro and Anthony and William Martinez to the Native Village of Circle pursuant to 25 U.S.C. § 1911(b) are VACATED.

DATED: 2/19/93

/s/
Mary E. Greene
SUPERIOR COURT JUDGE

APPENDIX 4

I, Eddie F. Brown, Assistant Secretary - Indian Affairs, by virtue of the authority granted to the Secretary of the Interior by the Act of June 18, 1934 (48 Stat. 984), as amended, and delegated to me by 230 D.M. 2.4, do hereby approve the Constitution of the Circle Native Community, Alaska. This approval shall not be construed to validate any assertion that the Circle Native Community has governmental authority over lands (including management of, or regulation of the taking of fish and wildlife) or persons who are not members of the Community, absent a ruling by a court of competent jurisdiction, an opinion of the Solicitor of the Department of the Interior or an Act of Congress

subsequent to the date of this certification which indicates the existence of such authority over lands or non-members. This Constitution is effective as of this date; Provided, That nothing in this approval shall be construed as authorizing any action under this document that would be contrary to Federal Law.

Eddie F. Brown /s/
Assistant Secretary -
Indian Affairs

Washington, D. C.

Date: October 4, 1991

Supreme Court, U.S.
FILED
MAY 20 1993
OFFICE OF

No. 92-1536

In The

Supreme Court of the United States

October Term, 1992

CIRCLE NATIVE COMMUNITY,

Petitioner,

v.

STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alaska

MEMORANDUM IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY

The State's Opposition to the Tribe's Petition for Review acknowledges the irreconcilable conflict between the decisions of the Ninth Circuit Court of Appeals and the Alaska Supreme Court over the power of Alaska Native Tribes to exercise judicial powers over Indian child custody proceedings. Opp. at 5-6. The State does not suggest that this entrenched conflict can be resolved in any way other than review by this Court. Rather, the State's opposition to the petition, seeks to avoid resolution of the conflict by raising a series of questionable issues that were not raised in the State court proceedings prior to the decision of the Alaska Supreme Court below. Upon remand from the decision below, the State Superior Court (the trial court), temporarily vacated orders allowing the Tribes intervention in the ongoing proceedings based upon erroneous allegations respecting the children's tribal membership and the Tribe's governmental form. These issues have now been resolved, and the Tribe has successfully re-intervened in the remanded proceedings after establishing the children's tribal membership and the lawful succession of the current tribal governments (Petitioner, Circle Native Communities) to the former tribal government.

There is now no question that the children are eligible for membership in the petitioner Tribe. That tribal membership determination was acknowledged by the California courts. It was acquiesced in by the children's mother and the State throughout the proceedings. It was not contested until after the Alaska Supreme Court remanded the matter. Subsequently, the Superior Court reconfirmed the tribal membership determination in the

remanded proceedings. The tribal determination of membership is conclusive as a matter of law and pursuant to the terms of a formal agreement between the Tribe and the State under Section 109 of the Indian Child Welfare Act.

The fact that the Tribe changed its name as part of its reorganization process, under the terms of the Indian Reorganization Act, has no bearing on the reviewability of the decision below. Petitioner had informed the State and the Alaska Supreme Court of this reorganization and name change. The State did not take issue of the matter. The Alaska Supreme Court did not view the question as a barrier to its authority to decide the case. Nonetheless, the Tribe has subsequently proven that the new tribal government is recognized by the BIA as the successor government for the Tribe.

In short, these issues were red herrings when raised and have been resolved in the remanded proceedings before the trial court. The real issue in this case is the conflict between the Ninth Circuit Court of Appeals and the Alaska Supreme Court respecting tribal powers over tribal children. This conflict continues to disrupt the Petitioner's lawful efforts to protect the tribal children involved in this case from abuse and neglect. Moreover, this conflict undermines the ability of Alaska tribes to protect their most important resource: their children.

ARGUMENT

I. PETITIONER CIRCLE NATIVE COMMUNITY IS THE "INDIAN CHILD'S TRIBE" WITHIN THE MEANING OF ICWA.

The State's Opposition to the Tribe's petition for certiorari argues that the children involved in this case are

not members of the Tribe. This is a new issue that was not raised until after remand by the Alaska Supreme Court. In any case, these assertions have now been disproven, and the Petitioner has provided evidence of the eligibility of the children for membership in the Tribe by tribal resolution. See Appendix A. The Petitioner is therefore the Indian children's tribe as defined in ICWA. 25 U.S.C. §1903(5). Additionally, the Alaska Superior Court has reinstated the Tribes intervention in the ongoing case by order entered on May 11, 1993. See Appendix B.[1] This issue is moot.

---

[1] The opinion of the Alaska Supreme Court in this case was entered on December 18, 1992. Three months later, after remand to the Alaska Superior Court, the State requested orders from the Superior Court vacating its initial orders allowing the Tribe's intervention in the proceedings, alleging that the Tribe had committed fraud respecting the tribal membership of the children. The argument caught the Tribe by surprise, since the State had originally notified the Tribe of the proceedings, filed pleadings with the Court alleging that Circle was the children's tribe and had entered a non-opposition to the Tribe's intervention.

In response, the Tribe provided tribal council resolutions to evidence the mother's tribal membership, and the eligibility of the children for membership in the Tribe. Additionally, the Tribe submitted copies of an agreement between the Tribe and the State respecting child custody proceedings. [Appendix C]. The agreement was authorized by Sec. 109 of ICWA [25 U.S.C. §1919] and AS 47.10.230(g), and became effective on Feb. 3, 1991. [id.] Notably, Sec. II(A) reads

> The Tribe's determination of a child's membership in the tribe shall be conclusive.

Additionally, Sec. II (B) is a stipulation that the State will not oppose any intervention by the Circle tribe unless another tribe seeks intervention, which is not the case in the matter at bar. The motions by the State to vacate the intervention orders on remand were a violation of that agreement.

II. THE CIRCLE NATIVE COMMUNITY IS AN INDIAN TRIBE UNDER ICWA.

In its opposition the State raises, for the first time in this litigation, the issue of Petitioner Circle Native Community's

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The terms of the 109 agreement are merely a reflection of the law. This Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) held that a "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence. . . . the judiciary should not rush to create causes of action that would intrude on these delicate matters." In *Martinez v. Southern Ute Tribe*, 249 F.2d 985 (9th Cir. 1957) *cert. denied*, 356 U.S. 960, the court held that absent express federal legislation, a tribe has complete authority to determine its membership, except where the question involves the distribution of property subject to federal supervision. Similarly, it is generally accepted that state Courts should not interfere with a tribe's rights to determine its own membership. *Patterson v. Council of the Seneca Nation*, 245 N.Y. 433, 157 N.E. 734 (1927); *See* COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 20-23 (1982); Cf. *Ollestead v. Native Village of Tyonek*, 560 P.2d 31 (Alaska, 1977). The Indian Child Welfare Act itself provides that states will accord full faith and credit to the public acts of the tribes, which, presumably, would include membership determinations. 25 U.S.C. §1911(d). *See also* 44 Fed. Reg. 67,584, §B1(b)(1) (1979) (BIA ICWA Guidelines).

The matter was apparently confused by the State's lack of knowledge respecting internal tribal affairs. In its opposition memorandum, the State presents a document which purports to be a tribal constitution dating from 1970 (see State's Opp. Memo, App. 2). Additionally, the State baldly asserts that the 1970 document was the only constitution in effect in 1990. *Id.* 11 n.2. The record below simply does not support this assertion. The facts of the matter are that in 1991 there was a constitutional debate within the Tribe which was stimulated by the Tribes request for a Secretarial election under the Indian Reorganization Act. 25 U.S.C. §476. One tribal faction believed that the pending IRA constitution was an interim constitution, while

tribal status. The State has never contested the tribal status of Circle Village. Nor does it contest the status of the "Native Village of Circle", which was the tribal government's name prior to its reorganization under the Indian Reorganization Act, 25 U.S.C. §476, and with whom the State entered into an agreement under §109 of ICWA.[2] In fact, the terms of the 109 agreement specifically acknowledge the tribal status of Circle and the government to government relationship created by the agreement. [Appendix C]. But, the State now questions whether the Circle Native Community, the tribal government reorganized under the IRA in mid-1991, is a successor tribal government to the former traditional tribal government, which originally intervened in the California and Alaska state court proceedings.

The Petitioner informed the Alaska Supreme Court's of these developments in its opening brief in the proceedings below. [Appendix D, at footnote 1] Petitioner

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another faction believed that the 1970 constitution was the tribal constitution. This controversy was ultimately resolved by the Secretarial (BIA) election in 1991. As a practical matter, however, the issue was irrelevant given the 109 agreement with the State which confirmed the tribal council's right to determine membership issues.

[2] As noted by the State, the ICWA's definition of Indian tribe specifically includes any village as defined in the Alaska Native Claims Settlement Act. 24 U.S.C. §1903(8). Circle was listed as a village in the Alaska Native Claims Settlement Act. 43 U.S.C. §1610(b)(1). The tribal status of Circle was confirmed by the Court in *Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990), rev. on other grounds *Blatchford v. Native Village of Noatak*, 111 S.Ct. 2578 (1991).

informed the Court of its name change and the governmental reorganization under the IRA. The state did not raise the issue of succession at that time, nor did the State Supreme Court consider the matter particularly relevant. The succession issue was simply not, and is not now, at issue with respect to the issue for which this petition seeks review.

On remand from the State Supreme Court's decision below, however, the issue was raised before the trial Court for the first time. In response, the Tribe submitted an affidavit of Regina Perot, Alaska Area Tribal Operations Officer, Bureau of Indian Affairs, which clearly states that the Petitioner, Circle Native Community (IRA), is the successor government to the Native Village of Circle. [Appendix E].[3]

As a general matter, the political branch's recognition of a group of Indians as an Indian tribe is considered to be a non-justiciable political question, subject only to limited judicial review as to whether the action is tied rationally to the fulfillment of Congress' unique obligation toward Indians. *Baker v. Carr*, 329 U.S. 186, 214-15 (1962). This case does not deal with the issue of whether Circle is an Indian tribe. As noted above, the State is only questioning whether the Circle Native Community Council is the government for the Tribe. Generally, Indian tribes are free to structure their governments as they see

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[3] The affidavit was further supported by copies of correspondence between the tribe and the BIA which documented the reorganizational process and demonstrated the traditional government's participation and evolution into the IRA government.

fit. *See Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976). In this case, the reorganization of the tribal government under the IRA, which occurred in 1991, is recognized by the federal government as the Tribe's successor government by the BIA. There is nothing in the record, nor any argument, which suggests that the federal action of approving the Tribe's reorganization was not "tied rationally to the fulfillment of Congress' unique obligation toward Indians." Absent such a record, the federal government's recognition of the Petitioner Circle Native Community Council as the successor tribal government is non-justiciable.[4] Petitioner is therefore the proper (and only authorized) party to seek review of the decision below, which undermines the Tribes authority over its children.

III. THE PETITION PRESENTS AN IMPORTANT ISSUE ON WHICH THERE IS AN EXPLICIT CONFLICT BETWEEN THE NINTH CIRCUIT COURT OF APPEALS AND THE ALASKA SUPREME COURT.

The issue presented in the Tribe's petition is fairly straightforward. Specifically, "Do Alaskan Tribal Courts

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[4] Oddly, the State argues that the Secretary of the Interior did not use the word "tribe" in approving the tribal constitution. The preamble of the Constitution, which was approved by the Secretary of the Interior, clearly states that the Native people of Circle "assert our freedom as a sovereign people in a dependent association with the United States of America." That is how this Court has described an Indian tribe from its earliest opinions dealing with the subject. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

retain concurrent jurisdiction over child custody matters?" In this matter, *Matter of F.P.*, 843 P.2d 1214 (Alaska 1992) (Pet. Cert., App. A), the Alaska Supreme Court decided the matter in the negative. In *Native Village of Venetie I.R.A. Council v. State of Alaska*, 918 F.2d 797 (9th Cir. 1990), the Ninth Circuit Court of Appeals decided the matter in the affirmative. The State's opposition to the Tribe's petition acknowledged the divergent opinion of the Ninth Circuit and the Alaska Supreme courts, each of which has expressly refused to follow the other's reasoning on the issue. *See* Opposition, pp. 5-6. Equally significant, the State does not deny the importance of this issue in Alaska. As noted in the petition and in the brief of *amici*, the two courts' rulings affect over 200 Alaska tribes. There are several pending children's cases before Alaskan tribal courts, not to mention pending litigation in the State courts regarding this issue. The resolution of this controversy can only be resolved by this Court, and the importance of the issue to numerous Alaska Native tribes, families and children could not be more compelling.

CONCLUSION

The State's opposition is clearly intended to raise new issues in the case in order to avoid review of the Alaska Supreme Court's decision. The issues of the children's tribal membership and the tribal government's succession, however, have been resolved in Petitioner's favor, and cannot provide a ground for avoiding the real issue of contention: i.e., do Alaskan Tribal Courts retain concurrent jurisdiction over child custody matters? This

is the issue in permanent conflict between the Ninth Circuit and the Alaska Supreme Court. It can only be resolved by this Court. The Tribe respectfully requests the Court to grant the writ of certiorari.

Dated this May 20, 1993, at Fairbanks, Alaska.

MICHAEL J. WALLERI

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122 First Ave.
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(907) 452-8251
Counsel for Petitioner

APPENDIX A

Tribal Membership Resolutions

NATIVE COMMUNITY OF CIRCLE
CIRCLE COMMUNITY COUNCIL

RESOLUTION RECOGNIZING ELIGIBILITY FOR TRIBAL ENROLLMENT

RESOLUTION NO. 93-12

WHEREAS, the Circle Community Council has the inherent authority to determine tribal membership for the Native Community of Circle, an Indian tribe as defined under 25 USC 1903 (8), and

WHEREAS, the Circle Community Council has reviewed the ancestry and the cultural, family, and personal ties of the minor child, W.M., to the Native Community of Circle,

THEREFORE BE IT RESOLVED that the Circle Community Council determines that the child, W.M., is an Indian child under 25 USC 1903 (4) & (5), eligible for enrollment as a tribal member in the Native Community of Circle.

DULY ADOPTED THIS 4 day of MAY, 1993.

/s/ Louie A. John
Council Chief 2nd Chief

CERTIFICATION

This certifies that the above resolution was duly adopted at a convened meeting of the Circle Community Council, at which time a quorum was present. This resolution was adopted by a vote of 4 for, 0 against, with 0 abstaining.

/s/ Angela M. Ludwick
Council Secretary

NATIVE COMMUNITY OF CIRCLE
CIRCLE COMMUNITY COUNCIL

RESOLUTION RECOGNIZING ELIGIBILITY FOR TRIBAL ENROLLMENT

RESOLUTION NO. 93-13

WHEREAS, the Circle Community Council has the inherent authority to determine tribal membership for the Native Community of Circle, an Indian tribe as defined under 25 USC 1903 (8), and

WHEREAS, the Circle Community Council has reviewed the ancestry and the cultural, family, and personal ties of the minor child, A.M., to the Native Community of Circle,

THEREFORE BE IT RESOLVED that the Circle Community Council determines that the child, A.M., is an Indian child under 25 USC 1903 (4) & (5), eligible for enrollment as a tribal member in the Native Community of Circle.

DULY ADOPTED THIS 4 day of MAY, 1993.

/s/ Louie A. John
Council Chief 2nd Chief

CERTIFICATION

This certifies that the above resolution was duly adopted at a convened meeting of the Circle Community Council, at which time a quorum was present. This resolution was adopted by a vote of 4 for, 0 against, with 0 abstaining.

/s/ Angela M. Ludwick
Council Secretary

NATIVE COMMUNITY OF CIRCLE
CIRCLE COMMUNITY COUNCIL

RESOLUTION RECOGNIZING ELIGIBILITY FOR TRIBAL ENROLLMENT

RESOLUTION NO. 93-14

WHEREAS, the Circle Community Council has the inherent authority to determine tribal membership for the Native Community of Circle, an Indian tribe as defined under 25 USC 1903 (8), and

WHEREAS, the Circle Community Council has reviewed the ancestry and the cultural, family, and personal ties of the minor child, F.P., to the Native Community of Circle,

THEREFORE BE IT RESOLVED that the Circle Community Council determines that the child, F.P., is an Indian child under 25 USC 1903 (4) & (5), eligible for enrollment as a tribal member in the Native Community of Circle.

DULY ADOPTED THIS 4 day of MAY, 1993.

/s/ Louie A. John
Council Chief 2nd Chief

CERTIFICATION

This certifies that the above resolution was duly adopted at a convened meeting of the Circle Community Council, at which time a quorum was present. This resolution was adopted by a vote of 4 for, 0 against, with 0 abstaining.

/s/ Angela M. Ludwick
Council Secretary

APPENDIX B

Order of Intervention

IN THE SUPERIOR COURT OF THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN THE MATTER OF:)
)
M. A.)
DOB: 11/6/89)
)
M. W.)
DOB: 6/16/88)
)
P. F.)
DOB: 4/25/85)
)
Minors Under the Age of)
Eighteen (18) Years of Age.)
)

Case No. 4FA-91-37 CP

ORDER
(Filed May 11, 1993)

The Circle Native Community having filed its Second Motion to Intervene, and Supplemental Second Motion to Intervene; and the Court being fully apprised in the premises; it is hereby ordered that the village's Second Motion to Intervene is hereby GRANTED.

DATED at Fairbanks, Alaska this 11th day of May, 1993.

/s/ Charles R. Pengilly
Superior Court Judge

I certify that on 5-11-93
copies of this form were sent to
CLERK, BP
AG, FYS, OPA, FD, TCC

APPENDIX C

Tribal-State ICWA Agreement

INDIAN CHILD WELFARE ACT
STATE – TRIBAL AGREEMENT

BETWEEN

Native Village of Circle
TRIBE

AND

STATE OF ALASKA,
DEPARTMENT OF HEALTH AND SOCIAL SERVICES

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(Abbreviated)

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ICWA STATE-TRIBAL AGREEMENT

BETWEEN

Native Village of Circle

TRIBE

AND

STATE OF ALASKA,
DEPARTMENT OF HEALTH AND SOCIAL SERVICES

I.
INTRODUCTION

This Government-to-government agreement dated December 3, 1990 is entered into between the Native Village of Circle Tribe, hereinafter referred to as the "Tribe," and the State of Alaska Department of Health and Social Services, hereinafter referred to as the "State," pursuant to 25 USC § 1919, and under AS 47.10.230(g).

II.
PURPOSE AND POLICIES

The parties agree that there is no resource more vital to the continued existence and integrity of Alaska Native tribes than their children. Each Tribe in Alaska has a direct interest in protecting Alaska Native children who are members of or eligible for membership in the Tribe. The Indian Child Welfare Act (ICWA) recognizes the importance of this resource and declares that it is national policy to protect the best interests of Alaska Native children and to promote the stability and security of Alaska Native tribes and families.

In recognition of this policy, the State and Tribe, through their undersigned representatives, enter into the following agreement to provide state and tribal representatives with a set of written procedures for implementation of the ICWA. It is hoped that the adoption of uniform written procedures by the State and Tribe will ensure that the tenets of the ICWA are respected and followed. This agreement contemplates that both the State and Tribe will carry out the responsibilities set out herein.

This agreement is not meant to limit the legal rights of any party under the Indian Child Welfare Act.

A. Tribal Membership

The Tribe's determination of a child's membership in the Tribe shall be conclusive. (Cross Ref. V.A., page 11.)

B. Tribal Participation and Intervention

The State and Tribe agree that tribal participation and intervention are beneficial in every case involving a tribal child.

Intervention will not require that the Tribe be active in every phase of the cases in which it intervenes, only that it is a party to every case, and will receive all documents generated as part of the state court proceedings. At the time of initial intervention, the Tribe will indicate its intended activity level in a particular case.

Because placement of tribal children is the most important substantive provision of the ICWA, the Tribe agrees to participate in any phase of a case in which placement of a tribal child will be an issue. It is particularly important that the Tribe participate in the initial phases of a case, when the initial placement or disposition of an Alaska Native child is likely to occur. If the Tribe indicates that it will be inactive in a particular proceeding, the Tribe will not be required to attend all of the hearings in a custody case involving a tribal child. The Tribe may change its activity level in a case at any time by notifying the State.

The State agrees to be supportive of tribal participation by phone, in writing, or by any other means that will allow the Tribe to actively participate in a hearing. The State will recognize a tribal entity or non-profit organization which the Tribe may authorize to represent them in a child custody proceeding.

The State will not oppose any decision by the Tribe to intervene as a party in a child custody proceeding involving a tribal child unless more than one Tribe claims an interest in the child. If more than one Tribe claims an interest in a child, the State will not oppose intervention by the Tribe as a party once the relevant Tribes have agreed which Tribe shall act on behalf of the child.

C. Investigation

By entering into this agreement, tribal cooperation in child abuse or neglect investigations; including the sharing of information and the willingness of village contacts to testify in state court proceedings where appropriate, is contemplated. To facilitate the sharing of information the State will inform the tribe of any investigation involving a tribal child. The parties agree that the Tribe will designate a village contact and alternate(s) with whom the State will work on a regular basis to fulfill this agreement. (See Tribal Designation Form, Appendix I.)

The parties to this agreement recognize that the State will prioritize the investigation of reports of farm and that tribal cooperation in a child abuse or neglect investigation may be limited by available resources. (Cross Ref. V.B.1, and 2., page 11.)

D. Emergency Custody and Placement

If the State and Tribe disagree about the proposed emergency placement of the child or whether a need exists for emergency removal, the State shall proceed with temporary placement of the child, and the Tribe and State shall staff the removal within four (4) days of its occurrence. If the emergency custody of the child is released before a Child In Need of Aid (CINA) petition is filed and the child is returned to the family, the State will provide the Tribe with a copy of the report that goes to the court regarding the State's reasons for dismissing the case. (Cross Ref. V.C., page 13.)

E. Placement of an Alaska Native Child

The Tribe and the State agree that it is in the best interests of Alaska Native children who are removed from their homes, whatever the reason, to be placed whenever possible in Alaska Native homes or homes which reflect the unique values of the Tribe or of Alaska Native culture. The tribe and the State agree that they share a mutual interest in and responsibility for ensuring that placement occur in compliance with the ICWA.

The Tribe and the State agree that a child who must be placed out of his or her own home shall be placed in the least restrictive setting which most approximates a family in which the child's special needs, if any, may be met and is in responsible proximately to the parents or custodians from whom he or she was removed, in the absence of good cause to the contrary, while attempts are continuing to reunite the family. The State shall attempt

to place the child in the highest placement preference category and shall not place the child outside this order in the absence of good cause or agreement by the Tribe.

The parties agree that a child will be removed from the Tribal Village only if necessary for medical, psychological, or other examinations or interviews, or if the safety of the child cannot be ensured in the Tribal Village. The Tribe shall assist the State to identify and locate appropriate placements for a child, both within and outside the Tribal Village. If the Tribe designates a specific home as an appropriate placement for a child, the child shall be placed in that home in the absence of good cause to the contrary, as defined in section VII.E. of this agreement. (Cross Ref. VII., page 22.)

F. Licensing

It is a goal of this agreement that the Tribe will eventually assume responsibility for licensing tribal foster homes for the placement of tribal children. The State recognizes that the Tribe has the authority to develop its own licensing standards, which may not be identical to all of the standards used by the State. The State agrees to accept the Tribe's licensing standards after review if they meet basic standards to ensure the health and safety of the child. The State agrees to establish a procedure for review and acceptance of tribal licensing standards.

Once tribal foster licensing standards are accepted by the State the Tribe's selection of a home for the placement of a child shall be entitled to full faith and credit in the absence of information to the contrary. The State shall make foster care payments to tribally licensed homes for

children placed in those homes by the State. The State shall not withdraw its recognition of the Tribe's foster licensing program in the absence of a meeting between the parties to discuss problems and an opportunity for the Tribe to rectify any problems that are noted and substantiated.

The parties to this agreement recognize that tribal licensing may be limited by available resources.

G. Qualified Expert Witnesses

The State and Tribe recognize that it is appropriate to consult with experts on tribal customs and child-rearing practices in working to reunite the family, and in developing and implementing a remedial services case plan for the family and child. Use of such experts can assist the State in providing services and in making decisions with regard to Alaska Native children.

The State and Tribe recognize that the testimony of a qualified witness as defined by the ICWA is usually necessary in state child custody proceedings where the State seeks removal of an Alaska Native child from his or her parents or custodians. In this situation, the expert witness must speak to whether continued custody is likely to result in serious physical or emotional damage to the child, and whether the parents or custodians have a likelihood of changing the conduct that has caused or is likely to cause harm to the child. (Cross Ref. VI.G., page 20.)

H. Case Planning and Provision of Services

The State and Tribe agree that full participation of the family and Tribe in planning services is essential and can best facilitate achieving the goals of the ICWA. The State, the Tribe, the family and the child shall jointly staff each case and develop a case plan designed to protect the child, make a permanent plan for the child and reunite the family if possible and feasible. The State and Tribe agree to cooperate in identifying remedial services and to the degree that resources are available, providing or making them available to the family to achieve the goals of the case plans.

It is the policy of the parties to this agreement that services should be provided to the family in the Tribal Village if a case originated in that Tribal Village, or in the child's Community of Residence unless doing so is not consistent with the health, safety, and special needs of the child.

The case plan developed by the State, Tribe and family shall identify remedial services designed to reunite the family. The Tribe will participate in developing the case plan with the family and other affected parties, and in providing services to the family or child to the extent resources permit. The provisions of remedial services to the family shall include culturally appropriate services which are reasonably available.

It is the policy of the parties to this agreement that a family will not be required to meet a higher standard of care in order for a child to be returned to the home than would have been required to allow the child to remain in

the home at the time of initial intervention. (Cross Ref. VIII.A. and B., page 28.)

I. Permanency Planning

The Tribe and State shall identify a potential permanent placement within the placement preference categories for an Alaska Native child immediately, and in no event later than one (1) year from the child's initial placement. If the Tribe does not participate in placement efforts initially, the State will proceed with placement of the child consistent with the terms of this agreement. (Cross Ref. VIII.C., Page 29.)

J. Guardianship

It is the policy of the parties to this agreement that guardianship, including subsidized guardianship, shall be considered as an option in developing a permanent plan for a tribal child. (Cross Ref. VIII.D., page 30.)

K. Private Adoptions

It is the policy of the parties to this agreement that private adoption proceedings should follow the requirements of the Indian Child Welfare Act, particularly with regard to the placement of Alaska Native children within the placement preference categories of the ICWA and this agreement. The parties recognize that the State does not exercise complete regulatory control over private adoption proceedings under Alaska law, and therefore cannot control compliance with the ICWA and this agreement in

all private adoption proceedings. (Cross Ref. IX.B., page 31.)

L. Record Keeping

It is the policy of the parties to this agreement that placement information and documentation required by the ICWA will be collected and maintained by the State to its fullest capability and provided to the Tribe upon request, whether the Tribe has intervened in a particular proceeding or not. (Cross Ref. VII.A.3., page 23.)

M. Confidentiality

The State and Tribe agree to keep all information confidential regarding an Alaska Native child or a child custody proceeding under this agreement, except as required in judicial proceedings or by order of a court. The parties recognize that this confidentiality policy extends to all persons who are involved in a particular case, whether they be regular tribal or state employees, or whether they are associated with a case on an informal, contract, or consultant basis. Each party to the agreement shall be governed by the applicable confidentiality provisions of state, federal, or tribal law. (Cross Ref. VII.A.3., page 23.)

N. Reservation of Rights

This agreement is made in recognition of the current legal dispute between Tribes and the State about the legal status of Alaska Native Tribes and villages under federal and state law. The Tribe and State have entered into this

agreement before these legal disputes are resolved because of the vital interest that both parties have in insuring the health, safety and welfare of Alaska Native children. It is expected that major steps can be taken towards insuring the most effective and culturally appropriate social work practices with regards to Alaska Native children even in the absence of the immediate resolution of these issues.

Nothing in this agreement shall be construed as a waiver by the Tribe of any argument that the State lacks jurisdiction to apply its child protection laws and regulations to Alaska Native children in the Tribe's village, and the Tribe hereby expressly reserves its right to challenge the State's jurisdiction in any court of competent jurisdiction in any court of competent jurisdiction. (Cross Ref. XI., page 33.)

III.

DEFINITIONS

Terms in this agreement are to be interpreted as they are defined in the federal Indian Child Welfare Act, unless defined more specifically in this section.

"Alaska Native" means the same as "Indian" as defined in the Indian Child Welfare Act, 25 USC 1903(3).

"Child," "Alaska Native child," or "tribal child" shall refer to children who are members of the Tribe or eligible for membership in the Tribe.

"Community of Residence" is the Tribal Village or other community where the child maintains his or her primary residence at the time an investigation is initiated

or a petition is filed under this agreement. The term is not meant to apply to brief visits or temporary absences; it is meant to implicate the terms of this agreement when a child is considered by the community to be living in that community.

"Expert Witness," refer [sic] to section VI.G., on page 20.

"Guardianship" refers to the process by which a person is appointed by the court as a guardian for a child under AS 13.26.

"Intervention" refers to formally becoming a party to the state court proceeding.

"Staffing" or "Joint Staffing" refers to the cooperative process in which state and tribal representatives will work together to achieve the best result for each child who is subject to the terms of this agreement. These terms contemplate the sharing of information and resources so that both parties to this agreement can make fully-informed decisions about a child. Joint staffing under this agreement may take place in person, by telephone, in writing, or by other methods designed to communicate and reach decisions. the staffing may include other interested persons or parties; i.e. a guardian ad litem and parents.

"State" refers to the State as an entity, relevant state divisions or agencies, and to individual employees of the State, including consultants who are independent contractors, as applicable.

"Tribal representative" refers to a person who the Tribe's governing body has expressly authorized to represent the Tribe in child custody matters involving tribal children, and to represent the Tribe under this agreement.

"Tribal Village" means the Alaska Native community where the child is a member or is eligible for membership. If the child is eligible for membership in more than one tribe, then the village where the child resides or with which the child has the most significant contacts will be designated as the "Tribal Village."

"Tribe" means the Tribe as an entity, or the tribal representative who is implementing this agreement in a particular case. Where the Tribe has designated a tribal entity or non-profit corporation to act on its behalf, the term Tribe shall be used interchangeably with that entity. This agreement contemplates that the Tribe will have a tribal representative, social worker, or some other person designated to work with the State on a regular basis.

"Village Contact" or "alternate village contact" refers to a person in the Tribal Village who is designated by the Tribe to cooperate with the State during investigations in the Tribal Village under sections II.C. and V.

IV.
DELEGATION OF REPRESENTATION

The Tribe may delegate to a tribal entity or non-profit organization the right to represent the Tribe as a general matter in State child custody proceedings under this agreement. To make a general delegation, the Tribe shall

provide the information required on the Tribal Delegation Form, Appendix I.

The Tribe may delegate a tribal entity or non-profit organization to represent it in a particular child custody proceeding under this agreement by express authorization of the Tribe's governing body. If the Tribe decides to delegate another entity with the authority to represent it in an individual case, the Tribe shall provide a copy of the action authorizing such delegation to the State.

V.
INVESTIGATIONS AND EMERGENCY CUSTODY PROCEDURES

A. Determination of Tribal Membership

Policy: See Section II.A., page 2.

If the State initiates an investigation of a child it finds to be of Alaska Native descent, and the child's Tribe is unknown, but the State obtains information that the child may be a member of the Tribe or eligible for membership in the Tribe, the State will notify the Tribe as soon as possible and no event later than five (5) working days following receipt of such information, and obtain a determination from the Tribe as to whether the child is a member of or eligible for membership in the Tribe. The Tribe shall respond within thirty (30) days to inform the State whether the child is or is not a member of the Tribe, is eligible for membership, or whether the Tribe lacks sufficient information to determine membership at that time. The Tribe's determination of membership shall be conclusive. If the Tribe has information that the child may

be a member or eligible for membership in a different Tribe, the Tribe will provide that information to the State.

B. Investigation Procedures

Policy: See Section II.C., page 3.

Investigation procedures under this agreement are divided into separate sections, addressing investigation within the Tribal Village, and investigations in the child's community of residence when that place is not the Tribal Village.

1. Investigations in the Tribal Village

Upon opening an investigation, and initiating a response to a referral or referrals of suspected child abuse or neglect, the State shall notify the Tribe that an investigation has been initiated. This notification will take place by telephone, in writing, or in person as appropriate. The notification of investigation shall state the name of the child and the family that are the subjects of the investigation, and the nature of the abuse or neglect suspected.

The State expects as part of this agreement that the Tribe will designate an alternate village contact with whom the State can deal in emergency custody situations where the child involved is related to the primary village contact. If the subject of the investigation is a member of the household of the primary village contact, or is related to that contact, the State will communicate with the alternate village contact. The alternate shall have authority to

exercise all of the responsibilities of the primary village contact as set out in this section.

Upon entering the Tribal Village, the State shall communicate with the village contact unless communication has previously been made by telephone or letter.

When the state has made a determination as to whether child abuse or neglect exists and whether emergency custody is warranted, the State will inform the Tribe whether it has enough proof under the ICWA to justify removal of the child, and whether the State is concerned about the physical or emotional well-being of the child. The State will inform the Tribe of its investigation and findings, and of its decision as to whether to proceed to become involved in the case.

If the State decides to become involved in a particular case, the State will inform the Tribe of the actions it intends to take, and will discuss potential placement for the child. This information will be communicated to the Tribe before the State worker leaves the Tribal Village. If a village contact is not available to discuss the results of the investigation, the State will leave a brief written report with the tribal office or tribal social services office, or will communicate by telephone with the village contact as early as possible.

2. Investigation Process in Child's Community of Residence, Outside of Tribal Village

Where the State initiates an investigation of an Alaska Native child who is located outside the Tribal Village, the State will notify the Tribe when possible

before conducting the investigation. Use of the term "when possible" means that if the information received indicates that the child is not in danger of immediate physical or emotional harm, the State will notify the Tribe before initiating the investigation. If the child is in danger, the State will conduct the investigation and possibly remove the child, and then will notify the Tribe by telephone or by letter, as soon as possible, and in no event later than three (3) working days after the child is removed. If the Tribe has designated a tribal entity or non-profit organization to act on its behalf in the area where the child who is the subject of the investigation resides, the State will contact the tribal entity or non-profit organization under this paragraph.

Once the initial investigation has been conducted, the State and Tribe will conduct any further activity pursuant to other sections of this agreement. The State will provide the Tribe with the findings of its investigation, even in circumstances where the State concludes that further intervention is not warranted. The Tribe and State shall share information regarding the background of the family and child and any prior reports of suspected abuse or neglect or other problems in the family.

3. Investigations that do not Result in the State Opening an Ongoing Case

In cases where the State is not opening an ongoing case on a family or has not filed a Child In Need of Aid petition, but where the family needs services to prevent future problems, the State shall refer the family to appropriate services, and shall notify the Tribe of the referral

and the services recommended. The State and Tribe may staff such a case to develop a service strategy. The Tribe shall monitor families who are located in the Tribal Village as to whether they are following through with the recommended services.

C. Emergency Custody and Placement

The procedures for taking emergency custody of an Alaska Native child shall vary depending on whether the child is being removed from the Tribal Village, or from the child's Community of Residence when it is not the Tribal Village.

1. Removal from Tribal Village

Investigation procedures are discussed in Section V.B. When the State decides that emergency custody of an Alaska Native child is necessary, the State will immediately notify the Tribe if possible, prior to removing the child from the Village. The State will make every effort to place the child within the Tribal Village if an appropriate home can be identified. If the Tribe has previously identified homes to be used for emergency placement of Alaska Native children, the child shall be placed in one of those homes in the absence of good cause to the contrary.

If emergency removal from the Tribal Village is necessary, the child will be returned to the Tribal Village as soon as an appropriate placement is located by the Tribe and State, after a joint staffing, or to the parent or custodian from whom the child was initially removed if reunification is appropriate. If the child is removed from

the Tribal Village by law enforcement personnel, the State shall notify the Tribe as soon as it receives a referral on the child.

2. Removal from Child's Community of Residence when the Community is not the Tribal Village

If an Alaska Native child is removed from his or her home for emergency reasons and the State has reason to know that the child is or may be a member of or eligible for membership in the Tribe, the State will notify the Tribe within three (3) working days about such removal and where the child is placed, as well as any temporary custody hearing that is scheduled or may be contemplated. If the State does not know what tribe a child is from when it effects emergency removal of the child, it shall make diligent efforts to ascertain the child's tribe and shall notify the Tribe, under the provisions of Determination of Tribal Membership of this agreement. See section V.A.

Upon request of the Tribe, the State shall convene a staffing to review the emergency placement of the child. If the Tribe disagrees with the placement of the child and recommends another placement, the State shall follow such recommendation in the absence of good cause to the contrary.

If the emergency removal of a child is terminated before a Child In Need of Aid petition is filed or heard, the State will provide the Tribe with a copy of its report to the court on the case.

VI.
CHILD IN NEED OF AID PROCEEDINGS

A. Procedures

Policy: See Section II.B., C., D., and G., page 2.

1. General Provisions regarding Intervention and Information Sharing

The State shall provide the Tribe with copies of all motions, notices of hearings, and orders filed in the case, as well as reasonable and adequate notice of any case conferences and the opportunity to participate fully in such conferences. The State shall provide the Tribe with copies of the original case plan and all subsequent case reviews and court reports.

Upon the Tribe's request, the State will make available to the Tribe all discoverable material within fifteen (15) working days from the date the order of intervention is granted. In the event the State is unable to comply with the fifteen (15) working days due to unforeseeable circumstances, the State will advise the Tribe of the date when the material will be available.

The State shall consult with the Tribe prior to filing a petition except in emergency cases where the child is at immediate risk of physical or emotional harm. When an emergency exists, the State will consult with the Tribe about the filing of the petition as soon as possible after the petition is filed.

The State will send notice to the Tribe required by Child In Need of Aid Rule 7(e) within five (5) working days of the filing of the petition.

If the Tribe decides not to intervene in a particular case, the State will not make a complete disclosure of records and other documentation in the file to the Tribe absent a court order. The State will, to the extent possible, share information with the Tribe regarding placement of the child and information necessary for the Tribe to make services available to the family. If the Tribe decides not to intervene in a particular proceeding, it will be provided copies of the original petition, annual reviews of a proceeding, extensions of custody, State decisions to proceed with termination of parental rights or guardianship, notice of any placement review hearing, and pre-dispositional report.

2. Intervention Procedure

Intervention by the Tribe shall be governed by the rules of the State court. If the Tribe intervenes in a State court proceeding, its attorney or spokesperson shall have the right to participate as a full party in the case. The State will not oppose representation of the Tribe by a person other than an attorney, under State court rules.

The Tribe may intervene through its attorney, through a spokesperson, or through another entity delegated to act on behalf of the Tribe as described above. Parents shall be recognized as parties in the proceeding without the necessity of formal intervention.

3. Discovery

The State will provide the Tribe with all information from the State's case without the necessity of the Tribe complying with formal discovery procedures. The Tribe

will give notice that it intends to visit the State office where the case file is located, with a reasonable time frame, in order to look at the State's case file and copy relevant documents. The State and Tribe will cooperate in identifying the documents that need to be copied.

The Tribe and State agree to keep all information regarding a child custody proceeding under this agreement confidential. The Tribe shall be provided with access to all information that is released to other professionals. If the State refuses to make certain information available to the Tribe because of confidentiality concerns and the Tribe disagrees with that decision, the Tribe may seek a court order ordering the release of such information.

The Tribe shall provide the State with discoverable information and records on the child and/or family. Tribal representatives with knowledge of the case or with custody of discoverable records shall testify in the state court. If necessary to cover the costs of appearance or for other reasons, a subpoena shall be issued.

4. Miscellaneous

The Tribe may request a continuance of the initial temporary custody hearing as necessary to permit tribal participation and intervention in that proceeding. The State will attempt to minimize the cost of telephone calls necessary for the Tribe to participate, intervene, and assist in the development of case plans in individual cases.

B. Filing a Child In Need of Aid Petition

The decision to file a petition alleging neglect or abuse of an Alaska Native child is within the authority of the State.

The State and Tribe shall consult, either before or after the petition has been filed, about the merits of the petition. If the Tribe disagrees with the State's decision to file a petition, the Tribe may oppose the petition and the subsequent judicial proceedings that take place. The consultation shall include a discussion of services that the Tribe and State can perform to alleviate the need for State intervention with the child and family.

C. Notice

1. Initial, Formal Notice

In any State court proceeding involving an Alaska Native child, if the State has reason to believe that the child is a member of or eligible for membership in the Tribe, the State will send notice to the Tribe required by Child In Need of Aid Court Rule 7(e) within five (5) working days of the filing of the petition. This section also applies in those cases where the State has not previously informed the Tribe that it is investigating a child or has not previously informed the Tribe that a child has been removed who is a member of or eligible for membership in the Tribe during its investigation of the child and family.

Notice to the Tribe will include, but is not limited to, the following information:

a. The name, date of birth, and previous addresses of the child.

b. The name, date of birth, and previous addresses of the child's parents and Alaska Native custodians, if known. If the whereabouts of such persons are unknown, the State shall include a statement of the efforts made to identify or locate such persons.

c. A statement that the child appears to be or is a member of the Tribe and the reasons for such belief, or of the fact that the child may be a member of more than one tribe, including the names of the other tribes with which the child may be affiliated.

d. A statement as to whether the child is already a ward of the State court or any other court of competent jurisdiction. If the child is in custody, a copy of such wardship orders, if available, shall be attached to the petition.

e. A statement of the facts leading the State to file the petition.

f. A statement of the State's efforts to comply with the placement preferences of the ICWA and this agreement at the time the petition is filed.

g. A statement as to which other entities the State is sending notice of the proceeding.

At the time of formal notice to the Tribe, the State will provide the Tribe with a form entitled "Tribal Membership Form", by which the Tribe may inform the State in written form that the child is considered a member of the Tribe or eligible for membership in the Tribe. The Tribe shall return the form to the State within thirty (30)

days from the time it is received by the Tribe, unless the Tribe requests an extension of time to respond to the form.

2. Initial, Courtesy Notice

At the request of the Tribe, the State shall send a courtesy notice to an entity designated by the Tribe. Such a request may be made by providing the required information on the Tribal Designation Form, Appendix I.

3. Procedure for More Than One Tribe

If more than one Tribe responds to the State court ICWA child custody proceeding, the State shall notify the Tribe of the identity of the other tribes. Further treatment by the State of the Tribe as a party in such a situation shall be dependent upon a written intertribal agreement provided to the State designating the Tribe as the Alaska Native child's tribe or upon the Tribe's successful intervention in the State court proceeding as the Alaska Native child's tribe.

4. Notice in Child In Need of Aid Proceedings Involving Adoptive Parents

The State will notify the child's original Tribe of Child In Need of Aid proceedings involving adoptive parents to the same extent it notifies Tribes in proceedings involving biological parents, when removal of the child from the adoptive home is a possible end result. If the child is in an Alaska Native or other Indian adoptive

home, the State will also notify the Tribe of the adoptive parents. Also, see section IX.C., Failed Adoptions.

D. Adjudication

The Tribe, to the extent possible, shall develop a position on the following issues prior to the adjudicatory hearing on an Alaska Native child:

a) the Tribe's position on the Child In Need of Aid petition;

b) services which should be provided to reunite the family, including those services provided by the Tribe;

c) services for the family that are available in the Tribal Village, including those services provided by the Tribe;

d) recommendations for placement of the child; and

e) any other recommendations to the State or the court.

The State shall consult with the Tribe, in person or by telephone, to the extent necessary to assist the Tribe in developing positions on the items listed above. The Tribe and the State will share with each other their positions on the case before the adjudicatory hearing. If the Tribe has intervened in the case but is inactive in the adjudicatory phase, the Tribe will submit its position in writing to the State, which shall present the Tribe's position to the Court. If the Tribe is taking an active role in the case, it shall present its position in person.

The State shall notify the Tribe of the date and time of the adjudicatory hearing.

E. Disposition

The Tribe and State shall staff the case before the dispositional hearing with regard to their positions in the case on services for the family and/or child and placement of the child. This staffing shall take place sufficiently in advance of the dispositional hearing so that the position of the Tribe can be included in the pre-dispositional report to the court. The State will incorporate the views of the Tribe into its pre-dispositional report provided the information is received at least fifteen (15) days before the dispositional hearing is scheduled. The State may proceed with disposition without the Tribe's participation if the Tribe does not participate in the pre-hearing staffing or preparation of the pre-dispositional report.

The State shall notify the Tribe of the date and time of the dispositional hearing, even if the Tribe has not intervened in the case or has intervened but is taking an inactive role, except that no notice will be given if adjudication and disposition have already occurred at an earlier stage of the proceeding. The State will provide the Tribe with a copy of the pre-dispositional report. The pre-dispositional report will state what role the Tribe will play in providing services to the family or in arranging or monitoring the placement of the child, the services the Tribe has available for the family, and whether the Tribe and State disagree about any aspects of the disposition of the case, and if so, the nature of the disagreement.

The Tribe will have a representative with knowledge of the case and the services that can be provided available, in person or by telephone, to testify with regard to the Tribe's position. The State may subpoena a representative of the Tribe to testify as appropriate, and the Tribe agrees to provide such testimony.

F. Termination of Parental Rights Proceedings

The State will notify the Tribe of the date and time of the termination of parental rights hearing. The Tribe will notify the State in advance of the termination of parental rights hearing about whether they will participate as an active or inactive party. The Tribe will inform the State prior to the termination of parental rights hearing as to whether they will support or oppose the termination of parental rights petition, or if they have no position.

The State will use expert witnesses as set out in Section VI.G. in any termination hearing involving an Alaska Native child. State and federal law will control the standard of proof for termination of parental rights in any termination proceeding involving an Alaska Native child.

G. Qualified Expert Witnesses

Policy: See Section II.G., page 5.

1. Introduction

The State will use tribal experts in providing services to the family, in consultations on cultural issues involving

the family or child, and in making such assistance available to service providers and caregivers, to the extent feasible and appropriate.

There are three categories of persons who shall be considered experts under this agreement and under the ICWA:

a) a member of the child's Tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices;

b) a non-professional person who has substantial experience in the delivery of child and family services to Alaska Natives, and extensive knowledge of the prevailing social and cultural standards and child-rearing practices within the child's Tribe; or

c) a professional person who has substantial education and experience in the area of his or her specialty.

The Tribe recognizes that the State may not always use the experts that the Tribe has recommended in a particular case or which the Tribe places on its list of potential expert witnesses. This agreement recognizes that the Tribe and State may disagree about the desired outcome in a particular case, and that in such a situation it may be inappropriate to restrict the State to experts recommended by the Tribe. The State may use other experts in addition to or in place of those recommended by the Tribe.

2. Tribal List of Qualified Expert Witnesses

The Tribe shall prepare a list of expert witnesses who will be available to consult with the State in cases involving tribal children and identify those who may be willing to testify in state child custody proceedings under the Indian Child Welfare Act involving tribal children. The experts selected by the Tribe shall be knowledgeable in the following area or areas:

a) tribal customs and traditions relating to child-rearing;

b) tribal standards for placement of children who must be removed from their parents or custodians; or

c) tribal standards for the care and custody of tribal children.

Where cultural factors are an element in a state child custody proceeding involving a tribal child, the State agrees to strongly consider using the Tribe's list of experts for testimony. The State will attempt to use the Tribe's list of experts at temporary custody hearings.

The Tribe's list of expert witnesses shall include each witness's name, address, phone number, tribal affiliation, current employment, education, professional and/or lay experience, and the areas in which the Tribe recognizes the witness's expertise. The Tribe shall update this list as necessary. The list shall be attached and maintained as an appendix to this agreement. (See Tribal List of Qualified Expert Witnesses, Appendix II.)

Where the State proposes to not use an expert from the Tribe's list of experts, the State will inform the Tribe

to that effect and the reasons why. The State shall consult with the Tribe at the Tribe's request.

VII.

PLACEMENT OF AN ALASKA NATIVE CHILD

A. Placement Process for an Alaska Native Child

Policy: See Section II.E., page 4.

1. Initiation of Placement Process

When the State has made a decision to recommend removal of an Alaska Native child from his or her home in a non-emergency situation, the State shall consult with the Tribe within ten (10) working days, by telephone, to obtain the Tribe's recommendations for appropriate placements.

The Tribe shall designate a person or office with whom the State should begin the consultation by providing the information required on the Tribal Designation Form, Appendix I. (Also, see section V.C., Emergency Custody and Placement.)

2. Placement Procedure

The State and Tribe shall take the following steps to locate an appropriate placement for an Alaska Native child:

Within ten (10) days after a child has been removed from his or her home, the State shall contact the Tribe by

telephone or in writing to obtain the Tribe's recommendations as to appropriate placement of the child. The State shall attempt to place the child in the highest placement preference category, and shall not place the child outside this order in the absence of good cause or upon agreement by the Tribe.

The Tribe and the State shall share information on potential placements relevant to their appropriateness as foster parents, and to the extent possible, the Tribe shall assist the State in screening information and investigating potential placement options.

The Tribe and the State shall decide the most appropriate placement for the child at a placement staffing. At this staffing the child's and parents' preferences shall be considered, if appropriate. This staffing shall take place within thirty (30) days from the time the search for placements has started in the absence of agreement between the parties to extend the time. If the State and Tribe disagree on the placement of the child, the State shall notify the Tribe in writing of its intent not to follow the Tribe's placement recommendation and the reasons therefore.

If no identified placement for a child can be located within a placement preference category, the child may be placed in the next category. If a placement with an extended family member or another tribal home cannot be located or is not appropriate, the State will provide a list of potential foster or adoptive placements from other sources to the Tribe for its comments and review. This list shall include possible Alaska Native homes when available. The State will consider placements in Alaska Native

homes that are culturally related to the Tribe. The State shall place the child in the home selected by the Tribe from the list, in the absence of good cause to the contrary as defined in VII.D. The State will cooperate with the Tribe in attempts to recruit tribal homes as foster placements for the child.

Factors to consider in deciding to place the child in reasonable proximity to the parents include the parents' visiting history with the child, how often the parents move, and how long the State or Tribe has been working with the family to alleviate the necessity for the out of home placement. The placement selected should best ensure the least restrictive setting that most approximates a family and include provisions for the child's special needs, if any.

3. Placement Records

The State will make placement documentation from its case file available to the Tribe upon request.

The Tribe shall, to the extent resources permit, document in writing its efforts to identify and locate appropriate placements within the placement preference categories. The Tribe will provide such information to the State for inclusion within the State's placement records within sixty (60) days after placement of a tribal child.

The State shall maintain records of each placement made by the State of an Alaska Native child evidencing efforts to comply with the order of preferences. These records shall be made available to the child's Tribe. The

request of the Tribe shall be made in writing and be addressed to:

Director
Division of Family and Youth Services
Department of Health and Social Services
P.O. Box H-05
Juneau, Alaska 99811-0630
(907) 465-3191.

4. Review of Placements

Cases where the child has not been placed within the preference categories of this agreement shall be internally reviewed by the State every thirty (30) days until the child has been placed within such categories, the Tribe agrees to an alternative placement, or the child is placed in a potential permanent placement.

The Tribe shall be included in every six-month review on every Alaska Native child that is in out-of-home care to review the situation of the child, whether the current placement falls within the placement preference order and is serving the needs of the child, whether the child can be returned to his or her parents or custodians in the future, and whether an alternative placement would better serve the needs of the child.

The Tribe may request permission from the State, on a case-by-case basis, to obtain access to the child's therapy records and to consult with the therapist(s), if applicable.

B. Foster Care Placement Preference Order

By this agreement the Tribe designates the following order of preference for determining where the child should be placed for purposes of foster care placement:

[1] a member of the child's extended family;

[2] a foster home licensed, approved, or specified by the Tribe;

[3] an Alaska Native foster home licensed or approved by the State;

[4] an institution for children approved by an Alaska Native tribe or operated by an Alaska Native organization which has a program suitable to meet the child's needs.

The tribal designation of the order of preference for foster care placement made above may be changed by formal, written, tribal resolution given to the State under the provisions of section X.B., Amendments, of this agreement.

C. Adoptive Placement Preference Order

By this agreement the Tribe designates the following order of preference for determining where the child should be placed for purposes of adoptive placement or guardianship:

[4] a member of the child's extended family;

[1] a member of the child's Tribal Village;

[3] a member of another Tribe with whom the child is culturally related;

[2] a member of another Alaska Native tribe.

The tribal designation of the order of preference for adoptive placements made above may be changed by formal, written tribal resolution given to the State under the provisions of section X.B., Amendments, of this agreement.

D. Good Cause Not to Follow the Placement Preferences

Good cause not to follow the placement preferences of this agreement shall be determined only after a joint staffing between the State and the Tribe. Good cause shall be limited to the following factors:

1. the child has extraordinary physical or medical needs that cannot be met within the preference categories, as established by an expert witness;

2. suitable families within a placement preference category are not available after a diligent search, as set out in this section, has been completed; or

3. potential placements within a placement preference category would not ensure:

a) the least restrictive setting that most approximates a family; or

b) reasonable proximity to the parents or custodians from whom the child was removed while reunification efforts are ongoing.

If the State and Tribe agree that good cause exists, the alternative placement may be made without judicial review and the Tribe shall stipulate to the placement until

a suitable home within the placement preference categories is located. If the State and Tribe, after a staffing, disagree about whether good cause exists, the Tribe may request a court hearing to review the propriety of such alternative placement. The State shall have the burden of proof, by clear and convincing evidence, in such a hearing. This paragraph does not apply to disagreement over a specific home; it applies only to whether good cause as a general matter exists.

The State and Tribe agree that, in general, the following factors do not constitute good cause:

1. inconvenience to state officials or state agencies;

2. the social or economic status of any potential placement, or the inability of a home within the placement categories to take custody of a child without financial assistance;

3. the temporary absence of a parent or custodian from the village to take advantage of remedial or rehabilitative services;

4. emotional or physical needs of the child for which services exist within the village;

5. a parent's request for anonymity or request that a child be placed outside the placement preference categories;

6. the handicapped condition of a foster parent unless it directly affects the ability of the foster parent to care adequately for the child; or

7. bonding or attachment between the child and a foster parent where the Tribe has been actively involved in the case, provided the Tribe had notice of the case.

E. Monitoring Placements

The State and Tribe shall monitor placements of Alaska Native children under this agreement to ensure that they remain appropriate for the child and that the placements receive the support they need to be successful for the children. The Tribe and State will cooperate in efforts to monitor placements in the Tribal Village, to the extent possible, including periodic contacts or visits with the home, and periodic evaluations of the services provided, including appropriate cultural and traditional services, to the child and families.

F. Change of Placement

The provisions of this section shall apply each time that a change of placement of an Alaska Native child is contemplated. In the absence of an emergency, the Tribe and State shall staff the proposed change of placement before it takes place. If an emergency exists, the placement provisions of the emergency removal section of this agreement shall apply. The Tribe and State shall jointly staff a proposal to return an Alaska Native child to the parent(s) or custodian(s) from whom the child was originally removed. If the Tribe disagrees with the State's decision on a change of placement of a child after a staffing has taken place, the Tribe may seek judicial review.

G. Notice of Placements

The State shall send the Tribe change of placement notices which shall be in writing and include the following information:

a. the name of the prior placement;

b. the name of the proposed new placement;

c. the relationship of the new placement to the child and/or family; and

d. whether the new proposed placement is in a home that meets the placement preference categories of this agreement.

A change of placement notice shall be sent for every placement, including the initial placement after removal from the home of the parent(s) or custodian(s) and the child's return to the home of the parent(s) or custodian(s).

H. Voluntary Placements

The State shall notify the Tribe of voluntary placements involving tribal children about whom it receives notice. In voluntary placements of tribal children, the State will follow the placement process as set out in this agreement.

VIII.

CASE PLANNING

Policy: See Section II.H., page 5.

A. Timing of Case Plan

A case plan shall be developed before adjudication and disposition of a case takes place, including stipulated

or summary adjudications. In any event, no later than sixty (60) days from the date of placement or the date a case is opened, the Tribe and the State shall staff the case to develop a case plan with the family and child. The State agrees to consult with the Tribe to the extent possible to assist the Tribe in determining what services are appropriate and available for the family. The Tribe will participate in providing services to the extent possible in conjunction with the State.

B. Services

1. Services in the Tribal Village

If the child has been removed from the Tribal Village, the State will inform the Tribe in the case plan of the services that would have to be available in the Tribal Village before the child can be returned to the Tribal Village without danger. If the child has special needs such as medical needs, the State will inform the Tribe of the services that must be available within the Tribal Village before the child can be safely returned. In each of these cases, the State will specify the reasons why the child needed to be removed from the Tribal Village in the first instance, and what conditions would permit the child to be returned to the Tribal Village.

2. Remedial Services

The Tribe shall provide the State with a list of the remedial services which are available in the Tribal Village. This list will include traditional services and culturally appropriate services. The Tribe will identify services which it could provide in the Tribal Village if financial support existed or which it would like to provide but cannot for financial or other reasons.

The case plan developed by the parties to the proceeding shall identify with specificity the minimum requirements for family reunification so the family knows exactly what they must do to obtain the return of their child as early as possible. The case plan will not be modified or changed after it is established except as necessary to account for changed circumstances or new information that has been discovered.

The case plan shall identify the specific parental behaviors which the plan is attempting to alleviate or change, and shall contain, at a minimum, the following elements:

a. the services to be rendered, who is to render them, and who is to participate in each service;

b. the estimated time frame for each of the services rendered;

c. the estimated time frames within which the parental behaviors are to be corrected or alleviated, with the consequences that may occur if improvement does not occur;

d. a detailed explanation of what constitutes acceptable compliance with each of the services rendered;

e. the specific duties of the State or Tribe in providing each of the described services, including who will assist in providing access to each service and how such access will be accomplished; and

f. a proposed placement plan for the tribal child.

The State shall provide a copy of all case plans developed under this agreement to the Tribe. The Tribe will express its position regarding the proposed case plan at the time of any staffing, or at any time that the plan is not accomplishing the objectives it was designed to accomplish.

At the request of the State, the Tribe will define what are acceptable community standards within the Tribal Village. Where appropriate, the Tribe will define what it considers to be unacceptable parental conduct and parental unfitness by tribal standards.

C. Permanency Planning

Policy: See Section II.I., page 6.

The State and Tribe shall staff permanency planning for an Alaska Native child. Permanency planning shall begin at intake, and the State shall make efforts to place the child in a home that may serve as a permanent placement at the time the child is first placed. The Tribe shall be involved in permanency planning from the time a case begins, to the extent resources permit. The State

shall confer with the Tribe prior to making a final decision to proceed with termination of parental rights. The State will inform the Tribe at a regular case staffing or at any other time when the State has made a decision to recommend placing an Alaska Native child in a permanent placement. The State will use available tribal cultural consultants as appropriate in the permanency planning process.

The Tribe and State shall decide whether the initial placement is also appropriate for long term placement if attempts to reunite the family are unsuccessful. If the Tribe and State decide that the initial placement of the child is not appropriate for permanent placement, they will work to identify other potential homes within the placement preferences. Joint planning will resume in such situation when the Tribe notifies the State of its intent to participate in placement efforts for the child.

D. Guardianship

Policy: See Section II.J., page 6.

Documentation in considering guardianship as an option shall be included in the case file. Subsidized guardianship shall be actively explored in determining the best placement option for an Alaska Native child.

IX.

ADOPTIONS

A. Adoptive Placement Preference Order

Refer to section VII.C., Adoptive Placement Preference Order, page 24.

B. Procedure in Private Adoptions

Policy: See Section II.K., page 6.

Whenever the State has knowledge or when information comes to the attention of the State that a private adoptive placement involving a tribal child is contemplated, and the proposed placement for the child may be in violation of the placement preferences of the Act and this agreement, the State will file a statement with the court that the proposed placement may not be in compliance with the ICWA, and will inform the Tribe of the pending proceeding.

C. Failed Adoptions

Whenever the State has knowledge that the adoptive placement of a tribal child has failed because the parental rights of the adoptive parents are terminated, the adoption is vacated, or the adoptive parents voluntarily consent to termination of their parental rights or to another adoptive placement, the State will notify the child's Tribe and attempt to notify the biological parents or original Alaska Native custodian of the child. If it is determined after an ICWA proceeding that return of the child to the

biological parents or Alaska Native custodian is not in the best interest of the child, the State will attempt to place the child according to the placement provisions of this agreement. This section also applies to failed or terminated guardianships, as applicable.

All of the provisions of this agreement shall apply to the removal of a tribal child from an adoptive family the same as they would to removal of a child from his or her biological parents or Alaska Native custodian, except those that may extend rights to Alaska Native or Indian adoptive parents that the ICWA does not provide to non-Alaska Native or non-Indian adoptive parents.

Whenever a final decree of adoption of an Alaska Native child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Alaska Native custodian may petition for return of custody. (Also, see section VI.C.4., Notice in Child in Need of Aid Proceedings involving Adoptive Parents.)

X.

MISCELLANEOUS PROVISION

A. Effective Date

The Tribe and State may sign this agreement at different times. This agreement will be effective sixty (60) days after the later signature. The Tribal Designation Form, Appendix I, and Tribal Qualified Expert Witness List, Appendix II, are incorporated into this agreement by reference.

B. Amendments

Any provision of this agreement in which the Tribe is exercising an option or making a designation may be amended by the Tribe. Such amendments must be made by formal resolution of the Tribe and will become effective sixty (60) days after the State receives the tribal resolution. Tribal amendments must be sent to the State at the following address:

Director
Division of Family and Youth Services
Department of Health and Social Services
P.O. Box H-05
Juneau, Alaska 99811-0630
(907) 465-3191

C. Questions or Concerns

The parties to this agreement are expected to try to resolve any concerns as early as possible.

Inquiries about this agreement or concerns about compliance with this agreement should be addressed to the head of the Tribe or the Director of the Division of Family and Youth Services.

XI.

RESERVE SECTIONS

Policy: See Section II.N., page 7.

Issues Reserved for Subsequent Negotiation

The issues which are reserved for future negotiation and discussion at this time are:

1. Tribal courts;

2. Jurisdiction;

3. State funding for social services and for children placed in foster homes by a Tribe.

XII.

REVOCATION

This agreement may be revoked by either party upon 30 days written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction.

APPENDIX I

TRIBAL DESIGNATIONS UNDER THE INDIAN CHILD WELFARE ACT STATE-TRIBAL AGREEMENT BETWEEN THE STATE OF ALASKA AND _____

11/30/90
Date Approved By Tribe

_____
Date Received By State

Effective Date
60 Days From Date Received

Delegation of Representation (Cross Ref. IV.)

If the Tribe has delegated to a tribal entity or non-profit or another Tribal organization the right to represent the Tribe as a general matter, it shall provide the information required below.

Tanana Chiefs Conference, Inc.
DESIGNATED ORGANIZATION

122 1st Avenue, Fairbanks, Alaska 99701
MAILING ADDRESS

(907) 452-8251
PHONE

Tribal Village Contacts (Cross Ref. II.C; V.B.1.)

The following persons are designated to receive notice of State actions and to cooperate with State representatives in accord with applicable terms of this agreement.

Larry Nathaniel
NAME

Box 2 Circle, Alaska 99733
MAILING ADDRESS

(907) 773-7425 (mess)
PHONE

Special Instructions for Contacting: At above number noon to 4:00 p.m. Mon to Fri

Alternate: Tina Patrick
NAME

General Delivery, Circle, Alaska 99733
MAILING ADDRESS

(907) 773-1226 (mess)
PHONE

Special Instructions For Contacting: Phone number is her grandfather, Helge Boquist

A Second Alternate may be designated only if the primary and alternate Village Contacts are related. A Second Alternate may be someone outside the Village.

Second Alternate: None
NAME

_____
MAILING ADDRESS

_____
PHONE

Special Instructions for Contacting: _____

Designee For Placement Consultation (Cross Ref. VII.A.1.)

The person or office the State shall contact to begin consultation concerning the placement of a tribal child in a non-emergency circumstance is:

Don Shircel/Tanana Chiefs Conference, Inc.
PERSON/ENTITY

122 1st Avenue, Fairbanks, Ak 99701
MAILING ADDRESS

(907) 452-8251
PHONE

Designee for Courtesy Notice (Cross Ref. VI.C.2.)

The following entity is designated by the Tribe to receive a courtesy copy of initial notices sent by the State under section VI.C.2. of this agreement:

Don Shircel/Tanana Chiefs Conference, Inc.
PERSON/ENTITY

122 1st Avenue, Fairbanks, Ak 99701
MAILING ADDRESS

(907) 452-8251
PHONE

STATEMENT OF AGREEMENT

The State and the Tribe, through their undersigned representatives, hereby enter into the foregoing Agreement, which will become effective 60 days after the later signature (Section X.A.) and is ongoing until revoked (Section XII).

STATE OF ALASKA

By: Myra M. Munson
Title: Commissioner Dept. Health and Social Services
DATE: Dec. 3, 1990

TRIBE

By: Larry A. Nathaniel
Title: Chief Native Village of Circle
DATE: December 1, 1990

Instructions for Tribe: Complete two original Agreements and submit *both* to the State. When the State has signed

the Agreement, one original Agreement will be returned to the Tribe.

The following items should be completed by the Tribe:

1. Cover Page, Name of Tribe (Village)
2. Page 1: Name of Tribe (Village) – *two* places
3. Page 24: Foster Care Placement Preference Order
4. Page 24 and 25: Adoptive Placement Preference Order
5. Page 34: Revocation (number of days notice required)
6. Page 35: Appendix I
7. Page 37: Appendix II
8. Page 40 and 41: Statement of Agreement Signature Pages

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7. Page 37: Appendix II
8. Page 40 and 41: Statement of Agreement Signature Pages

NATIVE VILLAGE OF CIRCLE
VILLAGE COUNCIL
RESOLUTION NO. 90-16

WHEREAS, the Native Village of Circle recognizes that there is no resource more vital to the continued existence and integrity of the tribe than its children; and

WHEREAS, the Native Village of Circle has a direct interest in protecting the children who are members of or eligible for membership in the Native Village of Circle; and

WHEREAS, the State of Alaska has offered and agreed to enter into a government-to-government agreement between the State and the Native Village of Circle recognizing that the Native Village of Circle is a tribe and to provide state and tribal representatives with a set of written procedures for implementation of the Indian Child Welfare Act;

NOW THEREFORE BE IT RESOLVED that Larry A. Nathaniel tribal member of the Native Village of Circle, is hereby authorized to sign the ICWA State-Tribal Agreement.

Done by Council action this 30 day of November, 1990.

CERTIFICATION

I, Larry A. Nathaniel, the secretary (chief) of the Village Council for the Native Village of Circle, do hereby certify that on the 30 day of November, 1990, a quorum of the Village Council of the Native Village of Circle was formed, and passed the above resolution by 3 voting in favor and 0 voting against the measure.

/s/ Larry A. Nathaniel – Chief
Secretary

APPENDIX D

Excerpt of Opening Brief

for

Native Village of Circle

STATEMENT OF THE CASE

FACTUAL BACKGROUND

The children at issue in this action are Alaska Native children who are members of the Native Village of Circle,[1] an Indian tribe recongized under terms of the Indian Child Welfare Act (25 U.S.C. 1901 *et. seq.*)

In 1985 the mother of the children at [sic] involved in this action was arrested in California on charges of misconduct involving a controlled substance. The arrest preceded the birth of the two younger children. The oldest child, F.P., was about six months old at the time of the arrest and was taken into protective custody by the County of Santa Clara and placed in foster care with her maternal aunt. (R. 29)

In 1986, when the mother violated a Court order by leaving a residential treatment center to which she had been committed, the County of Santa Clara proceeded with permanency planning. Although the aunt petitioned for guardianship, she herself was arrested on drug charges and petition was never approved. A subsequent investigation into the history of this family revealed an extensive record of domestic violence and substance abuse by numerous family members. (R. 29, 30).

In June of 1988 the second child, W.M., was born, and was shortly thereafter placed in foster care.

---

[1] On October 4, 1991, the village reorganized under the terms of the Indian Reorganization Act and changed its name to the Circle Native Community of Alaska. For the sake of consistency with the record below, the fomer name is used herein.

APPENDIX E

Affidavit of Regina Perot

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

IN THE MATTER OF:	)
M. A.,	)
M. W.	)
P. F.	)
	)
Minor Children Under the Age of Eighteen (18) Years.	)
	)

Case No. 4FA-91-37 CP

AFFIDAVIT OF REGINA PAROT

STATE OF ALASKA)
) ss.
Fourth Judicial District)

Regina Parot, being duly sworn, upon oath, deposes and states as follows:

1. That I am the Area Tribal Operations Officer for the Juneau Area Office of the federal [sic] Bureau of Indian Affairs;

2. That I have worked in tribal operations since 1987 with the BIA;

3. That in my job as Area Tribal Operations Officer I provide guidance and technical assistance to tribal governments in Alaska;

4. That in my job I also supervise secretarial elections for adoption of Constitutions, pursuant to the Indian Reorganization Act;

5. That the Native Village of Circle, Alaska, through its traditional village council, submitted a request to reorganize under the terms of the Indian Reorganization Act;

6. That in my capacity as Area Tribal Operations Officer I reviewed the proposed IRA Constitution of the Circle Native Community, which did meet my approval, and I then submitted it to Washington D.C. where it was subsequently approved;

7. That the Circle native Community as reorganized under the IRA is the successor tribal government to the traditional council of the Native Village of Circle.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 10th day of May, 1993 at Fairbanks, Alaska.

/s/ Regina Parot
Regina Parot

SUBSCRIBED AND SWORN TO before me this 10th day of May, 1993 at Fairbanks Alaska.

/s/ Clyde D. Peters
Notary Public in and for the State of Alaska

My Commission expires on: 4/30/96

[SEAL]